

# No-Fault Divorce and Liability Without Fault: Can Family Law Learn from Torts?

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Twenty years after enactment of the first no-fault divorce statute,<sup>1</sup> no-fault divorce remains controversial. In its early years, no-fault was hailed as an important innovation in family law which affirmed personal autonomy with respect to intimate life choices, removed unnecessary pain from the divorce process and eliminated the need for costly litigation tactics that posed a threat of undermining respect for the judicial process.<sup>2</sup> In recent years, however, the no-fault system has come under attack. Some have argued that no-fault divorce has hurt women economically, stripping them of bargaining power that put them in a stronger negotiating position under the system where proof of fault was required.<sup>3</sup> While others contend that women are no worse off under no-fault than they were under the fault system,<sup>4</sup> no one has argued that the economic interests of divorcing women are adequately protected under no-fault.

No-fault divorce has exacerbated a particular problem that has long confounded family law: articulating a theoretical basis for alimony. Alimony was originally a remedy of the English ecclesiastical courts at a time when divorce, in its modern sense, was not permitted. At that time, the only remedy available for unsuccessful marriages was a legal separation, sometimes called a divorce *a mensa et thoro*.<sup>5</sup> Since there was no legal termination of the marriage, the traditional duty of spousal support continued.<sup>6</sup> In America, however, absolute divorce was available from the earliest colonial times.<sup>7</sup> The English institution of alimony, which served a clear purpose under English law, was imported into American law.<sup>8</sup> However, the legal basis for continuing a duty of support be-

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1. Family Law Act, ch. 1608, 331-32, 1969 Cal. Stat. 3312 (1970).

2. See *infra* text accompanying notes 41-42.

3. See *infra* text accompanying notes 46-55.

4. See *infra* text accompanying notes 61 & 129-33.

5. This was also sometimes referred to as a limited divorce, or a "divorce from bed and board." CLARK, *THE LAW OF DOMESTIC RELATIONS* § 12.1 (2d ed. 1988); O'Connell, *Alimony After No-Fault: A Practice in Search of a Theory*, 23 N. ENG. L. REV. 437, 448 (1988).

6. Originally, the duty of spousal support was owed only by the husband to the wife. CLARK, *supra* note 5, at § 6.1. The duty was based on the fact that upon marriage, a woman lost her title to personalty and her right to rents and profits from her realty. CLARK, *supra* note 5, at § 16.1. The wife owed a reciprocal duty to the husband—the duty to provide domestic services. *Id.* Because under a divorce *a mensa et thoro*, which was not a true divorce, the husband retained his rights with respect to his wife's realty and personal property, his duty to support his wife continued. Since the Supreme Court decision in *Orr v. Orr*, 440 U.S. 268 (1979), which held that alimony must be awarded on a sex-neutral basis, it is clear that both spouses now owe the duty of support to each other.

7. American law always offered divorce more freely than English law did, in part because of the absence of ecclesiastical courts. CLARK, *supra* note 5, at § 12.1. However, there was substantial variation in the marriage and divorce laws from colony to colony. O'Connell, *supra* note 5, at 451. Divorce became more freely available in England only after 1857, when divorce jurisdiction was transferred from the ecclesiastical courts to the civil court system. CLARK, *supra* note 5, at § 12.1.

8. CLARK, *supra* note 5, at § 16.1.

tween people no longer married to each other was not clear.<sup>9</sup> The courts began to offer many rationales for alimony,<sup>10</sup> but the lynchpins of that remedy became the notions of fault and women's economic dependency.<sup>11</sup>

In recent years, both of these rationales for alimony have been seriously undercut. Women have entered the workforce in increasing numbers, challenging the view that they are incapable of self-support,<sup>12</sup> and there has been widespread adoption of no-fault divorce. Although the question of how much progress women have made toward economic independence may be open to debate, the move to no-fault divorce has unequivocally demolished the fault rationale for alimony. A number of scholars have noted that the theoretical basis of this divorce remedy remains unclear,<sup>13</sup> and some have concluded that awards of ali-

9. Professor Homer Clark has stated:

[w]hen the English institution of alimony, which served the plain and intelligible purpose of providing support for wives living apart from their husbands was utilized in America in suits for absolute divorce . . . its purpose became less clear. As a result of absolute divorce, the marriage is entirely dissolved. It is harder to justify imposing on the ex-husband a continuing duty to support his wife than after a divorce *a mensa*, which does not dissolve the marriage. This difficulty is not obviated by labelling alimony a "substitute" for the wife's duty of support. Why should there be such a substitute? Would it not be more logical to say that when the marriage is dissolved all rights and duties based upon it end?

CLARK, *supra* note 5, at § 16.1.

The rationale for alimony in America was also undermined in the 1830's, when the Married Women's Property Acts began to restore to married women many of the rights they formerly lost upon marriage. See O'Connell, *supra* note 5, at 448-59; CLARK, *supra* note 5, at § 7.2.

There is a further problem of logic. When a marriage ends, the duty of one spouse to perform services for the other also ends. One could hardly imagine a court ordering one divorced spouse to continue to perform household tasks for the other. However, the court does have the power to order one spouse to continue to support the other financially. The fact that the obligations can continue on one side but not the other is, in the least, analytically troubling.

10. Over the years, courts have offered a number of rationales for alimony including fault, *Magruder v. Magruder*, 190 Neb. 573, 209 N.W.2d 585 (1973); *Mees v. Mees*, 325 N.W.2d 207 (N.D. 1982), replacement of the wife's dower rights, see, e.g., *Glick v. Glick*, 86 Ind. App. 593, 159 N.E. 33 (1927); *Wesley v. Wesley*, 181 Ky. 135, 204 S.W. 105 (1918); need, see, e.g., *Mori v. Mori*, 124 Ariz. 193, 195-96, 603 P.2d 85, 87-88 (1979), ability of the economically stronger spouse to pay, *Miles v. Miles*, 185 Or. 230, 202 P.2d 485 (1949); *MacDonald v. MacDonald*, 120 Utah 573, 236 P.2d 1066 (1951), awarding money to enable the custodial parent to stay at home to care for children, *Benvenuto v. Benvenuto*, 389 A.2d 795 (D.C. App. 1978); *Walton v. Walton*, 354 So. 2d 464 (Fla. App. 1978), maintaining the standard of living and lifestyle of the marriage, *In re Marriage of McNaughton*, 145 Cal. App. 3d 845, 852, 194 Cal. Rptr. 176, 179 (1983); *In re Marriage of Simmons*, 87 Ill. App. 3d 651, 659, 409 N.E.2d 321, 327 (1980) and awarding money that will keep divorced spouses off the welfare rolls, see, e.g., *Bowzer v. Bowzer*, 236 Mo. App. 514, 524, 155 S.W.2d 530, 535 (1941); *Wheeler v. Wheeler*, 188 F.2d 31, 33 (D.C. Cir. 1951).

11. When actual divorce became available in England, and when American states adopted secular divorce statutes, alimony continued, primarily justified as a remedy for the "innocent" wife and as a means to address the societal fact that women had few opportunities in the marketplace that would enable them to become economically independent. O'Connell, *supra* note 5, at 454-59; CLARK, *supra* note 5, at § 16.1.

12. See *infra* note 16.

13. See, e.g., CLARK, *supra* note 5, at 620; I. Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 1, 4-5 (1989); O'Connell, *supra* note 5, at 438. One might ask why there is any more reason to impose a duty of support on a former spouse than to revive the support obligation an ex-spouse's parents had during that spouse's minority. The economically stronger spouse may have financial resources, but what is the rationale for forcing him to continue to share his income with a person who no longer has a duty to perform services for him? A person may suffer a decline in his or her standard of living for any number of reasons. Should the fact that a person once had a particular standard of living as a result of a marital relationship mean that he is guaranteed that standard forever? The fact that many mothers of small children are now in the workforce weakens the argument that status as custodial parent justifies an award of alimony, and the policy concerns that might justify an award sufficient to keep a former spouse off of the welfare rolls does not supply a rationale for support in those cases not presenting such extreme circumstances.

mony have been fewer and lower under no-fault.<sup>14</sup>

This Article offers a rationale for alimony that is a departure from prior theories<sup>15</sup> and draws life directly from divorce in its modern no-fault cast. The central paradigm of this Article is that divorce can be viewed as an accident in which the losses are disproportionately imposed on one party. If divorce is viewed as an accident, policies and analyses drawn from tort law can provide the theoretical basis, in appropriate cases, for an alimony award.

There are many similarities between a divorce and an accident. In both cases, neither of the parties involved planned for the unfortunate event to happen, neither wanted it to happen, both may have taken all possible care to guard against its happening, but it happened anyway. Like an accident, a divorce can result in long term economic loss.

It could easily be assumed that any analogy between tort law and divorce would no longer be viable after the widespread enactment of no-fault divorce. After all, a major purpose of no-fault was to remove from divorce proceedings the whole issue of cruel, hurtful, or blameworthy behavior. But the analogy to tort law still has potential to provide remedies to the party suffering losses at the end of a marriage, if the idea of no-fault divorce is brought more into sync with recent developments in tort law. Approaches such as no-fault insurance and strict liability have eliminated consideration of fault in certain areas of torts. They have focused, instead, on rationales and mechanisms to compensate those who have suffered losses.

The party suffering economic loss at the end of a marriage is usually the wife. Despite the increased number of women in the workforce in recent years,<sup>16</sup> in many middle class and upper middle class marriages,<sup>17</sup> the wife limits her

14. No fault divorce was adopted in California in 1970. Lenore Weitzman's study of no-fault divorce in that state revealed that between 1968 and 1972, the percentage of wives awarded alimony dropped from 20% to 15%. WEITZMAN, *THE DIVORCE REVOLUTION, THE UNINTENDED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 169, 388-91 (1985) [hereinafter *THE DIVORCE REVOLUTION*].

Weitzman's conclusions that women have fared less well with respect to alimony under no-fault divorce have been supported in a study by Elizabeth Peters reported in *Marriage and Divorce: Informational Constraints and Private Contracting*, 76 AM. ECON. REV. 437, 446 (1986). Peters divided states into mutual consent states and unilateral divorce states. She found that the average amount of alimony was higher in mutual consent states than in unilateral divorce states. *Id.* at 449. Since there is no real difference in the substantive law governing alimony in the states in the two groups, the inference may be drawn that in mutual consent states the bargaining process between the spouse is similar to that which occurred prior to the enactment of no-fault divorce, *i.e.*, the spouse who does not wish to end the marriage has some degree of bargaining power that, in effect, requires the other party to buy his way out. See Ellman, *supra* note 13, at 8 n.16.

Despite popular perceptions to the contrary, alimony is awarded in only a small percentage of divorces. *THE DIVORCE REVOLUTION*, *supra* note 14, at 169, 388-91. A recent Census report revealed that in 1988, of the 19.3 million ever-divorced or currently separated women in the United States, 16% had been awarded alimony payments. UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, *CHILD SUPPORT AND ALIMONY 1987 (1990)*. The award rate for Whites (18.3%) was about twice that of Blacks (7.6%). The rate for Hispanics was 11.6%.

15. See *infra* text accompanying notes 94-133.

16. Between 1970 and 1984, the percentage of women in the workforce rose from 43.3% to 53.6%. For married women, the percentage increased from 40% to 52.2%. UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES* xxi (1990) [hereinafter *CENSUS*].

17. Alimony is obviously a divorce remedy that has relevance primarily to the middle and upper classes. The assumption in those contexts is that the husband has sufficient income to support himself while he continues to assist his former spouse. However, there are many families in this country that operate at marginal economic levels even while intact. Upon divorce, alimony is not an issue: the husbands simply do not make enough money to

opportunities for career development outside of the home in favor of domestic responsibilities.<sup>18</sup> The scenarios vary. The wife may work while her husband acquires a professional degree, thus providing the economic mainstay of the family while her husband obtains the training necessary to pursue a more lucrative career. In other marriages, the wife may play the role of traditional housewife, providing domestic services and raising the children while the husband advances in the workplace. In yet other marriages, both spouses work, but the wife devotes less time to her career in order to meet family obligations. Under any of these typical patterns, the wife may find herself at a serious economic disadvantage in the event of a divorce.<sup>19</sup> The reality is that most families live on incomes derived from employment, and most couples have little or no marital property to divide.<sup>20</sup> Most husbands earn more than their wives,<sup>21</sup> and it is usually the husband's career that is enhanced by the wife's abandonment or scaling down of her own. Unless after divorce both parties continue to share in the income of the spouse whose career has been enhanced, the other spouse may

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pay it. See *infra* note 21. For women in such marriages, the critical needs are for opportunities for education and training, appropriate child care and the elimination of sex segregation and other forms of discrimination in the workplace. There is an urgent need for more attention and resources to be directed to these issues which are of the utmost importance to poor and minority women.

18. See S. BERK, *THE GENDER FACTORY* 7-10 (1985); Goldfarb, *Marital Partnership and the Case for Permanent Alimony*, in *ALIMONY: NEW STRATEGIES FOR PURSUIT AND DEFENSE* 48 (American Bar Association, Section on Family Law 1988); Beninger and Smith, *Career Opportunity Cost: A Factor in Spousal Support Determination*, 16 *FAM. L.Q.* 201, 203 (1982).

19. Mary Ann Glendon has noted that "the nature and degree of their labor force participation and compromises between work and child care means that mothers end up with relatively lower earnings, less power and more vulnerability in divorce than fathers." M. GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 130 (1981).

This Article will discuss another marriage pattern: the two-income marriage in which there is no identifiable sacrifice by the wife that reduces her income potential in the event of divorce. In such marriages, the wife is still likely to suffer economic loss upon divorce because her earnings will often reflect the lower earning power of women. See *infra* note 21.

Although the descriptions of marriage patterns in this Article refer to the wife as the spouse who tends to sacrifice career development in favor of the marriage, and to the husband as the spouse whose career opportunities have been enhanced, a similar analysis would apply if the roles were reversed. Certainly, there are some marriages in which the wife is the primary breadwinner and the husband's career opportunities are compromised. However, such a marital structure is the exception rather than the rule. Thus at the present time, referring to the parties as husband and wife based on a presumption of the marital role allocations that are most prevalent in this society seems justified. There are some points in the analysis that are gender specific. For example, the discussion of market disparities, see *infra* text accompanying notes 180-83, and the discussion of the significance of some women's choices to give priority to domestic responsibilities relate to issues that affect women differently than they affect men. See *infra* text accompanying notes 177-79.

20. Studies have shown that most couples have little tangible property to divide at divorce. See, M. GLENDON, *THE NEW FAMILY*, *supra* note 19, at 94; Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 *UCLA L. REV.* 1181, 1190 (1981).

The two major financial awards possible at divorce are property and support. Support may be further divided into two categories: alimony and child support. Alimony is distinguishable as payments made to the ex-spouse for his or her own support. Although child support is thus distinct from alimony, as a practical matter, the standard of living of the custodial parent and the child will be determined by the total amount of money coming into the household, regardless of its formal designation.

The focus of this Article is on the wife's claim to alimony. However, a part of that claim may be based on the fact that she scaled down her participation in the workforce to fulfill domestic responsibilities which included childrearing.

21. According to a recent Census Report, the average weekly salary of White males is \$452, while that of White females is \$318. The average salary of Black males is \$347, while for Black females it is \$288. For Hispanics the relative figures were \$307 for males and \$260 for females. CENSUS, *supra* note 16, at 409 (1990).

face a bleak economic future. Recently some scholars have called for a renewed emphasis on alimony, and have noted the urgency of developing a rationale for that remedy that is not undermined by no-fault divorce.<sup>22</sup>

Part One of this Article compares the movement from fault to no-fault in torts and family law. Part Two identifies important tort goals underlying the shift to liability without fault in tort law and demonstrates that these goals are useful for an analysis of the issues presented by divorce. Part Three identifies existing rationales for alimony and other forms of economic awards and argues that they are inadequate to meet the needs of divorced spouses. Part Four analyzes specific tort goals in greater detail, and then applies this analysis to the no-fault divorce context.

Ultimately, the only protection for women in marriage is economic self-sufficiency. But the day when most women will be able to achieve that status is still far in the future. In the interim, there is a need to strengthen existing divorce remedies so that they more effectively protect women's economic interests. Reconceptualizing no-fault divorce in a way that promotes more equal sharing of divorce losses through alimony would be an important step toward this goal.

## I. FROM FAULT TO NO-FAULT IN FAMILY LAW AND TORTS

During the 1960's and 1970's, the concept of liability without fault expanded its scope in both torts and family law.

### A. Tort Law Develops

Approaches to compensation without proof of fault have a long history in tort law. The workers' compensation system, which dates back to the first two decades of this century,<sup>23</sup> is an early example of an effort to address the need for compensation for persons injured in certain employment contexts where accidents and injuries inevitably occur. Under this system, employees injured on the job essentially trade an uncertain, expensive, but occasionally highly rewarding tort action for a certain, inexpensive, but limited recovery of a fraction

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22. See, e.g., O'Connell, *supra* note 5; Ellman, *supra* note 13; Singer, *Divorce Reform and Gender Justice*, 67 N.C.L. REV. 1103 (1989). See also Brinig and Cardone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855, 984 n.152 (1988).

In recent years, there has been some movement away from the term "alimony." Alternative terms have included "spousal support," "maintenance," and "spousal maintenance." It has been argued that such terms more accurately reflect the idea of gender-neutral and fault-neutral claims based on need. See Ellman, *supra* note 13, at 10 n.20. To some, the term alimony may have negative connotations—most people have heard of the term "alimony drone" and are well aware of the negative stereotype it invokes. Another word may indeed be preferable. While what the transfer of wealth or income is called may be important, of more immediate concern is the elaboration of an invigorated concept of spousal support after divorce. I defer the question of the most desirable nomenclature to another time.

23. Ashford & Johnson, *Negligence vs. No Fault Liability: An Analysis of the Workers' Compensation Example*, 12 SETON HALL L. REV. 725 (1982).

of lost wages plus medical expenses. On the other side, the employer trades potentially open-ended liability for a strict, limited, shared liability system.<sup>24</sup>

Beginning in the 1970's, the widespread system of workers' compensation was joined by other compensation systems in which considerations of fault became irrelevant. One was automobile no-fault insurance, seriously discussed in the 1960's and enacted in a number of states in the 1970's.<sup>25</sup> Although the specific state statutory schemes vary, the general idea under no-fault is to require motorists to carry compulsory insurance to provide no-fault compensation to persons injured by their vehicles. No-fault benefits awarded include coverage, in varying amounts, for medical expenses and lost earnings.<sup>26</sup>

There have been other significant developments in no-fault compensation. Some of these efforts have been sponsored by the federal government. The National Childhood Vaccine Injury Act of 1986<sup>27</sup> provides compensation to the estimated seventy thousand children injured yearly as a result of immunization injections against the serious childhood disease of pertussis. Under this Act, there is no requirement that the vaccine be proved defective. Damages are to be paid upon a showing that the victim was vaccinated and soon after suffered one of the side-effects designated in the statute.<sup>28</sup> The Federal Coal Mine Health and Safety Act of 1969<sup>29</sup> provides compensation for workers suffering from coal mining related respiratory disorders. To receive compensation, a miner must show only that he has totally disabling black lung disease and that he contracted the disease from coal mining related employment.<sup>30</sup> A few private, elec-

24. *Id.*, at 725 n.1, citing A. CONRAD, J. MORGAN, R. PRATT, C. VULTZ AND R. BOMBAGH, *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS* 75 (1974).

Today, every state has a workers compensation provision. The various state programs differ in terms of their elective or compulsory character, the industries covered, the limits on recovery and the question as to whether they wholly replace or merely add on to the common law. Basically, however, such programs eliminate common law employer liability to injured employees as well as the common law employer defenses such as contributory negligence and assumption of risk. Instead, they provide for certain, no-fault employee recovery for work-related injuries. Ideally, the amount of recovery is 100% of medical expenses and 66 ⅔% of wage loss. Recovery for pain and suffering is not allowed. There are frequently ceilings on maximum income loss recovery and limitations on the period of time for which an injured employee may recover even though his losses and income need may continue. *Id.*, at 725 n.1. Employers are generally required to purchase insurance, post bonds or make other showings of financial ability to meet potential liability under the various worker's compensation statutes. *Id.*

25. See R. KEETON & J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE* (1965) [hereinafter *BASIC PROTECTION*]. For a general description of existing no-fault plans, see King, *State No-Fault Systems: Attorney's Guide to Statutory Provisions*, 4 PACE L. REV. 297 (1984).

26. See generally *BASIC PROTECTION*, *supra* note 25; see also; King, *supra* note 25.

27. P.L. 99-660. This Act was part of an Omnibus Health Bill, S. 1744 signed by the President on November 14, 1986. See 44 CONG. Q. 2920 (Nov. 15, 1986).

28. See S. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW* 106-10 (1989). The Act also covers victims of some other designated vaccines. *Id.* Pertussis immunization is required almost everywhere before children can enroll in school. It has been established that a small proportion of children who receive the immunization will suffer serious injuries. *Id.* at 107. See also, Schwartz and Mashigian, *National Childhood Vaccine Injury Act of 1986: An Ad Hoc Remedy or a Window for the Future?* 48 OHIO ST. L.J. 387 (1987). For a discussion of earlier federal vaccine injury compensation plans, see Reitze, *Federal Compensation for Vaccine Induced Injuries*, 13 B.C. ENVTL. AFF. L. REV. 169 (1986).

29. Pub.L. No. 91-173, 83 Stat 792 (1969).

30. M. FRANKLIN & R. RABIN, *TORT LAW AND ALTERNATIVES* 744 (4th Ed. 1987). For the current version of the Act see 30 U.S.C. §§ 3801 et. seq. See also *The Federal Black Lung Program: The View From the Top*, 87 W. VA. L. REV. 575 (1985).

tive no-fault plans have also been adopted. One, popularly known as the Wellington Plan, creates a voluntary system through which those claiming injuries from asbestos can process claims against participating asbestos manufacturers.<sup>31</sup> Another plan, known as the Scholastic Lifetime Medical and Disability Policy, provides for no-fault settlement offers in connection with catastrophic injuries of high school athletes.<sup>32</sup>

The concept of fault also underwent substantial change during this period through the doctrine of strict liability. The precise evolution of this doctrine remains unclear, although it seems to have deep historical roots.<sup>33</sup> In the 1960's and early 1970's, however, strict liability was expanded on a number of fronts: as a theory of recovery for injuries by defective products,<sup>34</sup> by an expansion of liability for ultrahazardous or abnormally dangerous activities,<sup>35</sup> by an expansion of recovery for harms caused by pollution,<sup>36</sup> and by an expansion of landowners' liability.<sup>37</sup> In each context, the focus was on relieving the plaintiff's burden of proving negligence and holding manufacturers, landowners and others who subject the public to certain hazards liable for the injuries they cause. Although application of strict liability in and of itself did not always guarantee a plaintiff's recovery,<sup>38</sup> removal of the requirement that the plaintiff prove fault did substantially increase the likelihood of compensation.

## B. No-Fault Divorce

During the same years that no-fault compensation plans and strict liability in tort were being expanded, the concept of fault was also undergoing a dramatic change in the law of divorce. In place of a system in which a spouse seeking divorce was obliged to prove that the other spouse had engaged in blameworthy behavior sufficient to terminate the marriage, no-fault divorce per-

31. The claimant need only prove an asbestos related disease and some level of dysfunction. FRANKIN & RABIN, *supra* note 30, at 745.

32. FRANKIN & RABIN, *supra* note 30, at 745-46. This plan was developed by Professor Jeffrey O'Connell, a pioneer and leading figure in the development of no-fault automobile accident insurance. For further discussion of the plan, see O'Connell, *A "Neo No-Fault" Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers*, 73 CALIF. L. REV. 898, 903-04, 914-15 (1985).

33. The concept of strict liability appears in court decisions in the mid 1800's imposing liability for escaping fires, water, straying cattle and rampaging wild animals. It also was invoked in the late 1800's to impose liability for injuries caused by blasting. FRANKLIN & RABIN, *supra* note 30, at 23-27, 434. *See also* Rylands v. Fletcher, L.R.3, 3 H.L. 330 (1868); Sullivan v. Dunham, 161 N.Y. 290, 55 N.E. 923 (1900) (discussing earlier cases involving liability for blasting).

34. *See, e.g.,* Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963); Barker v. Lull Engineering Co., 20 Cal.3d 413, 143 Cal. Rptr. 225, 573 P.2d 443 (1978).

35. *See, e.g.,* Spano v. Perini Corp., 25 N.Y.2d 11, 250 N.E.2d 31, 302 N.Y.S.2d 527 (1969) (liability for property damage caused by blasting without physical invasion of the damaged property); Indiana Harbor Belt R.R. Co. v. American Cyanamid Co., 662 F. Supp. 635 (N.D. Ill. 1987) (liability for spill of acrylonitrile—a flammable and toxic liquid chemical).

36. State v. Ventron, 94 N.J. 473, 468 A.2d 150 (1983) (mercury pollution emanating from a tract of land on which defendants conducted mercury processing); Atlas Chemical Industries Inc. v. Anderson, 514 S.W.2d 309 (Tex. Civ. App. 1974) (discharge of waste products into a stream where products settled on plaintiff's land).

37. In so doing, a number of courts have adopted the doctrine of Rylands v. Fletcher, L.R.3, 3 H.L. 330 (1868) which had previously been rejected by many American jurisdictions. *See, e.g.,* Cities Service Co. v. State, 312 So.2d 799 (Fla. 1975) (dam break permitted escape of phosphates into body of water killing fish and inflicting other damage); State v. Ventron, 94 N.J. 473, 468 A.2d 150 (1983) (pollution from mercury processing plant).

38. *See infra* text accompanying notes 136-37.

mitted termination of the marriage on the mere assertion by one spouse that the marriage had irretrievably broken down.<sup>39</sup>

### 1. *The Genesis of No-Fault*

No-fault divorce was a product of the times. The 1960's was a period marked by a dramatic shift in social values. The institution of religion, which had previously been inextricably linked to notions of sin and fault in divorce law, declined in importance.<sup>40</sup> There was increased emphasis on personal autonomy with respect to intimate life choices.<sup>41</sup> No-fault divorce reflects the view that individuals have a right to define the quality of their relationships and that the state should not force them to continue in marriages they no longer consider viable.

No-fault divorce also addressed concerns long expressed about certain negative effects of the fault system. For example, even where both spouses were agreeable to a divorce, they were still required to prove to the court that some fault ground had been committed by one of them. This often resulted in sham trials in which perjury and collusion were rampant, often taking place with the court's implicit consent. Scholarly work calling for no-fault divorce argued that there was a need to rid the legal system of requirements that necessitated behavior and tactics that were demeaning to judges, lawyers and litigants and that posed a danger of diminishing public respect for the courts.<sup>42</sup> Every state now has some provision for no-fault divorce.<sup>43</sup> In some states, fault concepts still

39. For an example of a typical no-fault statute, see the Uniform Marriage and Divorce Act § 302(2), 9 U.L.A. 181 (West 1987). Statutory provisions vary from state to state. In some states, fault grounds exist alongside no-fault grounds. For a compilation of state approaches, see Freed & Walker, *Family Law in the Fifty States*, 23 FAM. L.Q. 514-16 (1990).

40. Max Rheinstein described a shift from a "Christian-conservative ideology" to a "eudemonistic-liberal one." M. RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE AND THE LAW* 10-11 (1972). Carl Schneider has identified the evolution of family law as being due to a combination of the legal tradition of non-interference in family affairs, the ideology of liberal individualism, changing moral beliefs and the rise of "psychologic man." Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1807 (1985).

41. During the 1960's and 1970's, the Supreme Court decided a number of cases that established constitutional protection from state interference with respect to certain intimate life choices. See, e.g., Zablocki v. Redhail, 434 U.S. 374 (1978) (economic restrictions on marriage); Roe v. Wade, 410 U.S. 113 (1973) (abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) and Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception); Loving v. Virginia, 388 U.S. 1 (1967) (interracial marriage).

42. See, e.g., Steinbock, *The Case for No-Fault Divorce*, 10 TULSA L.J. 427 (1975); Walker, *Beyond Fault: An Examination of Patterns of Behavior in Response to Present Divorce Laws*, 10 J. FAM. L. 267 (1971); Cannell, *Abolish Fault-Oriented Divorce in Ohio: As a Service to Society and to Restore Dignity to the Domestic Relations Courts*, 4 AKRON L. REV. 93 (1971). The courts had also expressed concern about the prevalence of perjury and collusion. See, e.g., Garcia v. Garcia, 105 Cal. App. 2d 289, 233 P.2d 23 (1951); Potter v. Potter, 101 Fla. 1199, 133 So. 94 (1931).

Professor Herma Hill Kay has described the elimination of hypocrisy and perjury as one of the major goals and enduring achievements of no-fault. Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CALIF. L. REV. 291, 299 (1987).

43. Many no-fault divorce statutes were enacted in the 1970's. Kay, *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath*, 56 U. CIN. L. REV. 1, 51-55 (1987) [hereinafter *Equality and Difference*]. See generally Friedman, *Rites of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 664-65 (1984). Today, every state provides for some form of no-fault divorce. FREED & WALKER, *supra* note 39, at 514. On March 14, 1985, South Dakota became the last state to adopt no-fault divorce. 11 FAM. L. RPTR. 3015 (1985).



affect alimony or property division rules,<sup>44</sup> and some states specifically consider economic misconduct to be relevant.<sup>45</sup> However, in many states, fault may not be considered in dividing the financial wealth of a marriage.

## 2. *The Economic Consequences of No-Fault*

Whereas compensation of the victim was central to the development of no-fault tort schemes and strict liability, compensation of spouses suffering economic loss was an overlooked issue in the enactment of no-fault divorce.

A number of writers have argued that the economic disaster divorce often spells for women<sup>46</sup> has been exacerbated by no-fault.<sup>47</sup> The analysis, familiar to many, is as follows: Under the fault system, characterizations of spouses as "innocent" or "guilty" were very important.<sup>48</sup> Divorce was considered a remedy for the injured, innocent party. Upon a showing of recognized grounds for divorce,<sup>49</sup> the "innocent"<sup>50</sup> party was awarded a divorce. The finding of fault often also had another important function—it affected the distribution of the financial wealth of the marriage.<sup>51</sup> Divorce was a system of corrective justice. The party deemed guilty of fault often had to suffer financially. A "guilty" husband would have to pay alimony to his "innocent" wife.<sup>52</sup> Also, if an "innocent" wife be-

44. See I. ELLMAN, P. KURTZ & A. STANTON, *FAMILY LAW, CASES, TEXT PROBLEMS* 265-76 (1986); FREED & WALKER, *supra* note 39, at 546-47.

45. FREED & WALKER, *supra* note 39, at 532-33.

46. See, e.g., THE DIVORCE REVOLUTION, *supra* note 13; Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1249-53 (1981); McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351 (1987); Wishik, *Economics of Divorce: An Exploratory Study*, 20 FAM. L.Q. 79 (1986). Families headed by divorced and separated mothers are a rapidly growing part of this nation's poor. See Ehrenreich & Piven, *The Feminization of Poverty: When the Family Wage System Breaks Down*, 31 DISSENT 162 (1984). The National Advisory Council on Economic Opportunity has estimated that if current trends continue, the poverty population of the United States will be composed solely of women and children by the year 2000. National Advisory Council on Economic Opportunity, *CRITICAL CHOICES FOR THE 80's* 1 (1980).

47. No-fault divorce has been widely criticized. See, e.g., Fineman, *Implementing Equality: Ideology, Contradiction, and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789, 880-85; Murray, *Family Law, Twelfth Survey of Florida Law, Part One*, 30 U. MIAMI L. REV. 107, 108 (1976); *A Decade of No-Fault Divorce: What it has Meant Financially for Women in California*, 1 FAM. ADVOCATE 10, 15 (Spring 1979); Peters, *No-Fault Divorce and Bargaining over the Divorce Settlement*, in ALIMONY: NEW STRATEGIES FOR PURSUIT AND DEFENSE, 65, 70-74 (American Bar Association, Section of Family Law 1988). See also Cochran & Vitz, *Child Protective Divorce Laws: A Response to the Effect of Parental Separation on Children*, 17 FAM. L.Q. 327 (1983) (challenges wisdom of no-fault divorce laws that do not include a significant waiting period). See also Peters, *supra* note 14, at 446 (1986).

48. See, e.g., *Brown v. Brown*, 198 Tenn. 600, 613, 281 S.W.2d 492, 498 (1955) (citing *Brewies v. Brewies*, 27 Tenn. App. 68, 178 S.W.2d 84 (1946)). See also *Morrison v. Federico*, 120 Utah 75, 232 P.2d 374 (1931); *Hamm v. Hamm*, 30 Tenn. App. 122, 204 S.W.2d 113 (1947); *Strickland v. Strickland*, 183 Or. 297, 192 P.2d 986 (1948).

49. Typical grounds for divorce included mental cruelty, physical cruelty, adultery, and abandonment. See CLARK, *supra* note 5, at §§ 13.1-13.7.

50. The term "innocent party" refers to the spouse who was in a position to prove that the other spouse was guilty of some fault ground for divorce. Obviously, with respect to the breakdown of many marriages, there are no innocent or guilty parties. Instead, the marriage ends as a function of irreconcilable differences or incompatibility.

51. See CLARK, *supra* note 5, at § 16.1. O'Connell, *supra* note 5, at 466-67.

52. In many states, a "guilty" wife could not be awarded alimony. CLARK, *supra* note 5, at § 16.1. There was a lack of logic to this system of alimony based on "innocence" and "guilt." Until the United States Supreme Court case of *Orr v. Orr*, 440 U.S. 268 (1979), in many states, only women could be awarded alimony. An "innocent" husband could not receive alimony no matter how needy he was. Also, under the old system, a woman

lieved she would suffer financially as a result of divorce, she could simply refuse her husband's request for a divorce. Under such a system, fault provided a bargaining lever.<sup>53</sup> The "innocent" party could simply require the "guilty" party to purchase his way out of the marriage, and leaving could be an expensive proposition.

It has been observed that no-fault divorce shifted the bargaining power over economic issues from the spouse who did not want a divorce to the spouse who did.<sup>54</sup> Now, the party desiring to leave the marriage could simply leave, wait out the appropriate time period, and then obtain a divorce regardless of the wishes of the other spouse. The spouse who did not wish to end the marriage lost the bargaining leverage she had under the fault system.<sup>55</sup>

The most prominent of the critics of no-fault divorce is Lenore Weitzman. In her 1985 book, *The Divorce Revolution: The Unintended Consequences of No-Fault Divorce for Women and Children*, Weitzman reported on a ten-year research project on the effects of no-fault divorce in California. Her conclusion was that women and children have been hurt and hurt badly by no-fault. Weitzman found essentially that the equal division requirement mandated under California's community property system had lowered property awards to women below the unequal but higher awards some women had received under the fault system.<sup>56</sup> She further concluded that awards of spousal support were generally lower than they had been under the fault system.<sup>57</sup>

Some writers have embraced Weitzman's view that no-fault divorce has been an economic disaster for women.<sup>58</sup> Some have even advocated a return to fault.<sup>59</sup> Some have disagreed with Weitzman's methodology, findings, or conclusions.<sup>60</sup> Others are ambivalent on the issue of whether women are actually

who was deemed "guilty" of marital fault but who had been a major contributor to the wealth accumulated during her marriage, could receive no alimony. At the same time, a woman who contributed little to the marriage, but could not be proved to have engaged in behavior that constituted fault could receive an alimony award. For an extensive discussion of the evolution of the relationship between alimony and fault grounds for divorce, see O'Connell, *supra* note 5.

53. For a more detailed discussion of the relationship between legal rules and bargaining behavior in the context of divorce, see *THE DIVORCE REVOLUTION*, *supra* note 14, at 26-28; FINEMAN, *supra* note 47, at 801-02; Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950, 952-54 (1979); ELLMAN, *supra* note 13, at 6-7.

54. *THE DIVORCE REVOLUTION* *supra* note 14 at 26-28; Mnookin & Kornhauser, *supra* note 53, at 952-54, 968-69 (1979); Fineman, *supra* note 47, at 801-02.

55. See *THE DIVORCE REVOLUTION*, *supra* note 14, at 26-28; Mnookin & Kornhauser, *supra* note 53, at 952-54, 968-69 (1979); Fineman, *supra* note 47, at 801-02.

Professor Kay states that taking the "blackmail out of divorce was not an unintended consequence of the reform movement in California" even in the views of the Governor's Commission or in the Uniform Laws Commission. *Equality and Difference*, *supra* note 43, at 62-63. However, she also notes that there was no intention to deprive either men or women of the capacity to negotiate a fair agreement. *Id.* at 63.

56. *THE DIVORCE REVOLUTION*, *supra* note 14, at 74-75. Weitzman noted that where there was insufficient offsetting property some judges interpreted the no-fault divorce law to require sale of the family home in order to make an equal division of the marital property. *Id.* at 78-84.

57. *Id.* at 163-80.

58. See articles cited *supra* note 47. See also *supra* note 14.

59. See Golden & Taylor, *Fault Enforces Accountability*, 10 FAM. ADVOCATE 11 (Fall 1987); *New Conflict Over Fault: Is it an Idea Whose Time has Come Again*, 10 FAM. ADVOCATE 1 (Fall 1987).

60. See, e.g., Jacobs, *Faulting No-Fault: A Review of Lenore Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America*, 1986 AM. B. FOUND. RES. J. 767. (disputes Weitzman's quantitative data, her generalization of the California experience to the entire nation,

worse off under no-fault.<sup>61</sup> Regardless of the merits of these arguments on the effect of no-fault, there is little dispute that women continue to suffer economically as a result of divorce.<sup>62</sup>

Experts dispute the reasons no fault divorce did not ensure a mechanism for better economic recovery for women.<sup>63</sup> Professor Weitzman suggests that the proponents of no-fault set out to treat men and woman equally upon divorce but instead unintentionally devised a system that has functioned to the detriment of women and children.<sup>64</sup> Professor Herma Hill Kay differs. Her view is that the California Governor's Commission on the Family, which made the initial recommendation for the adoption of no-fault, did not have as a primary goal equality of the sexes. In fact, she states, the Commission recommended a number of measures that would have helped to protect the economic interests of women who were being divorced. According to Professor Kay, a major part of the problem is that the law that was finally enacted did not adopt these recommendations. Professor Kay also notes that the law that was passed contained a provision stating that the judge should take into account the ability of the supported spouse to engage in gainful employment and that this probably resulted in lower alimony awards.<sup>65</sup> The law eventually enacted in California, which did

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and her conclusion that the problems presently faced by divorced women are the product of no-fault divorce); Singer, *supra* note 22 (arguing that Weitzman ignored many negative attributes of the fault system). Some have argued that the California analysis cannot be applied to other states. Because California is a mandatory equal division community property state, it was often necessary for the family home to be sold in order to make the required equal division. Also, in California, only no-fault divorce is available—California is one of the states that has abolished fault grounds. Thus, some contend that a combination of these factors permitted no-fault divorce to have consequences in California that it might not have in states where the substantive law is different. See G. Dullea, *How Women Fare in No-Fault Divorce*, N.Y. Times (1988).

61. Mulroy, *No-Fault Divorce: Are Women Losing the Battle*, A.B.A. J. 76 (November 1989) (the answer as to whether women are worse off is not a simple yes or no). See also Singer *supra* note 22.

62. See *supra* note 46.

63. Professor Herma Hill Kay, who was a participant in the process resulting in the enactment of the first no-fault statute in California, notes that in that state, no-fault "was shaped by many different persons whose ideas were as contradictory as they were complimentary." *Equality and Difference*, *supra* note 43, at 27. At the time the California statute was being considered, the women's movement was in its early stages, there were no organized feminist groups and no-fault was supported by most of the women who were involved in its enactment. *Id.* at 56. Lenore Weitzman has also noted that no organized women's group participated in the debate on the new law. *THE DIVORCE REVOLUTION*, *supra* note 14, at 364-65.

Obviously, men had no interest in arguing that there was a need to evaluate the potential economic consequences of no-fault divorce on women. Professor Kay has noted that "the only organized interest group involved in the California reform effort was an association of divorced men who felt they had been treated unfairly and who thought divorce should be removed from the courts." *Id.*, at 56.

64. *THE DIVORCE REVOLUTION*, *supra* note 14, at 16-41. See *Equality and Difference*, *supra* note 43, at 3.

65. Professor Kay argues that although the Commission did not have among its goals the achievement of equality between the divorcing parties, its proposals did take into account the differential impact of divorce on men and women and sought to avoid that impact. But the legislature ignored many of the Commission's proposals. *Equality and Difference*, *supra* note 43, at 27-55. One proposal deemed particularly important was the establishment of a Family Court which, among other functions, would have offered dissolution counselling covering all aspects of separation and divorce including financial issues. Professor Kay states:

The Family Law Act made two significant changes in the Governor's Commission proposal concerning the financial aspects of marital dissolution that subtly altered the way judges would interpret the statute. The first was a change in the statutory language concerning the division of community property. The Commission, as I have noted, proposed an equal division of community property as the general rule but made clear that an unequal division could be ordered if the economic circumstances of the parties required it. The Family Law Act did not mention the possibility of an unequal division of the community property. Instead, it permitted an exception to the equal division rule where economic circumstances war-

not provide adequate economic protections for women, heavily influenced the positions adopted in the Uniform Marriage and Divorce Act and in the handling of no-fault divorce in other state legislatures.<sup>66</sup>

Many of the reasons for enacting no-fault divorce were valid ones. Protection of the integrity of the courts is a laudable goal. Recognizing individual autonomy with respect to intimate life choices is important in principle, and for the individuals involved, it certainly is nice that divorce has become a far less unpleasant process. But, the pain and possible humiliation of a divorce proceeding involving proof of fault pales in comparison to the lifelong consequences of a negotiated settlement or court decree under no-fault that leaves one party economically disadvantaged.

## II. THE DIVORCE/ACCIDENT ANALOGY

In thinking about the relevance of tort law to divorce, what readily comes to mind is the relationship between fault grounds for divorce and various intentional torts. Thus, mental cruelty can be analogized to the intentional infliction of mental distress; physical cruelty can be analogized to battery or assault.<sup>67</sup> In a structure in which divorce was a remedy for the innocent, injured spouse against the guilty one, the finding of fault provided a logical rationale for continuing the husband's duty to support his wife after termination of the marriage.<sup>68</sup> Thus, as in a tort action, the "wrongdoer" was required to compensate the "victim"—alimony could be seen as a form of damages.<sup>69</sup>

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ranted the award of a particular asset to one party on conditions appropriate to effect a "substantially equal" division of the property. Thus the Act authorized a much narrower exception from the equal division approach than the Commission would have done. Secondly, the Family Law Act specifically directed the judge to consider the supported spouse's ability to engage in gainful employment when setting the spousal support award. Although this direction was softened somewhat by the accompanying admonition not to interfere with the interests of children in the custody of the supported spouse, the statute could be read as urging judges to encourage ex-wives to go to work. That interpretation was reinforced by the 1969 legislative report drafted by Assemblyman Hayes in which he specifically cited the increasing number of working married women and called attention to their 'approaching equality with men.' The Governor's Commission had made no similar statement in the 1966 Report. Instead, as I have noted, the Commission recognized that a mandatory equal division of the community property might be unfair to women and children.

*Id.* at 42.

66. See *Equality and Difference*, *supra* note 43, at 51-55. The Uniform Marriage and Divorce Act appears to take a hostile approach to alimony. The official comment to § 308 states that "[o]nly if the available property is insufficient for the purpose and if the spouse who seeks maintenance is unable to secure employment appropriate to his skills and interests or is occupied with child care may an award of maintenance be ordered." UNIFORM MARRIAGE AND DIVORCE ACT, § 308 official comment, 9 U.L.A. § 348 (West 1987).

67. The defenses to fault grounds, connivance, condonation, collusion and recrimination also had tort analogues. Thus they implied consent, forgiveness or fault on the plaintiff's part. CLARK, *supra* note 5, at § 12.1 at 409. Professor Homer Clark has commented that "The divorce decree thus came to resemble a tort judgment, both being granted for the fault of the defendant causing harm to the plaintiff, and both being denied where the plaintiff either consented or was himself at fault." *Id.* at 409. There were also possible contract and criminal law analogues to some of the fault grounds. For example, in some states, adultery was also a crime. CLARK, *supra* note 5, at § 13.02 at 498. Today most states have abolished the criminal offense of adultery. *Id.*

68. Singer, *supra* note 22, at 1110-13.

69. The analogy has also been drawn between alimony and damages for breach of contract. See, e.g., *Kelly v. Kelly*, 183 Ky. 172, 180, 209 S.W. 335, 338 (1929) (alimony as damages for breach of the marriage covenant).

However, now that the shift has taken place from fault to no-fault, alimony can no longer be rationalized as compensation flowing from the guilty to the innocent. Still, no-fault divorce can learn from tort law by beginning to draw upon recent developments in torts grounded in the idea that compensation must be paid regardless of fault for certain kinds of losses. Thus, through recent developments such as no-fault insurance and strict liability, tort law has, in some contexts, shifted the focus from inquiries concerning fault to rationales and mechanisms promoting compensation. Specifically, family law should look to the tort doctrine of strict liability as a guide for developing an approach to distributing the economic losses stemming from divorce.

Looking to tort law for guidance is particularly appropriate because, in many ways, a divorce can be analogized to an accident. Each is an unexpected event that may be the fault of no one but results in serious economic loss.

Most people would probably define an accident as an unexpected event in which one person was injured as a result of the carelessness of another. But in tort law, the happening of the accident itself can be separated from the notion of fault. Thus, an accident can be neutrally described as an interaction between persons that results in harm.<sup>70</sup> Joseph Steiner has described an accident as "interaction damage."<sup>71</sup> An accident has also been described as an event resulting in an injury where the happening of the incident was unavoidable. In other words, an accident can be defined as an injury that occurs without fault.<sup>72</sup>

Before the ideas of no-fault and strict liability gained in acceptance in the 1960's and 1970's, accidents and divorces received similar treatment in the legal system. In each case, the party suffering losses was subjected to what in essence was a lottery: maybe she received compensation; maybe she did not.<sup>73</sup> In both contexts, that person was obliged to litigate her case. The litigation was costly, the outcome was uncertain, and any compensation ultimately awarded was often received only after substantial delay. Moreover, the amount of compensation awarded for similar losses could vary dramatically from case to case, and, frequently, the compensation was inadequate.

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70. Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury*, 36 U. FLA. L. REV. 333, 347 (1984).

71. Steiner, *Economics, Morality and the Law of Torts*, 26 U. TORONTO L.J. 227, 227 (1976).

72. See, e.g., *Brown v. Kendall*, 60 Mass. (6 Cush.) 292 (1850) (an "inevitable accident" is an accident the defendant could not have avoided by the use of ordinary care). The term sometimes used is "unavoidable accident." W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 162 (5th ed. 1984). Other terms include "mere accident," "pure accident" and "accident." *Id.* at n.1. See also *Anderton v. Montgomery*, 607 P.2d 828 (Utah 1980) where the court stated that "[u]navoidable accident, rather than being a separate legal doctrine, is simply a recognition of the fact that an incident causing injury to the plaintiff does not necessarily give rise to liability in the defendant." *Id.* at 834.

It could be argued that a divorce is different from an accident because while an accident occurs without intent, divorce is an event clearly intended by at least one of the parties. This argument does not undermine the analogy. Although the act of divorce itself is intentional, at the time of the marriage neither party intended that the venture they were about to undertake would end in that result. Moreover, in a no-fault analysis, where the reason for the end of the marriage is generally "irretrievable breakdown," issues of intent with respect to the injury-causing event should be irrelevant.

73. See Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967).

During the 1960's and 1970's, some tort law scholars began to analyze these problems of uncertainty, inconsistency, cost, and delay as failings of a tort system based on negligence. They began to parse out what they considered to be the different components of a tort. They divided a tort into a number of parts including the occurrence of the accident, the costs of the accident, and the issue of fault. They then began to identify the costs of the accidents, especially the economic costs. In his landmark book, *The Costs of Accidents*,<sup>74</sup> Professor Guido Calabresi makes a clear delineation between fault and costs and before seeking to determine what type of system would most effectively reduce accident costs.

#### A. *Primary, Secondary, and Tertiary Divorce Costs*

Calabresi defines three types of accident cost reduction goals, which he derived from primary, secondary, and tertiary accident costs. The primary costs of accidents are the costs to the individual occasioned by the occurrence and severity of the accident itself.<sup>75</sup> Primary costs include physical pain, emotional suffering, and sheer inconvenience.

Secondary costs of accidents are the societal costs resulting from accidents.<sup>76</sup> These costs include the economic costs to the individual and to society once the accident has occurred; secondary costs can also be described as consequential costs. Such costs to the injured person include items such as medical bills and lost wages. They also include money that must be paid to others to perform household or other tasks the injured party is no longer able to do. The larger society may incur secondary costs as a result of an accident where public funds must be used to support injured persons who lack the economic resources to meet their increased financial needs.

Finally, tertiary costs are the costs of administering the system that determines who, if anyone, is liable for the other accident costs.<sup>77</sup> Tertiary costs include the costs to the public of administering the courts and the costs to the litigants of prosecuting or defending their cases.

A Calabresian analysis can be applied to divorce. There are costs to the individuals involved simply due to the occurrence of the event. The primary costs of divorce include emotional pain and the disruption of habits, patterns, physical space, and interpersonal relationships.

Secondary divorce costs consist of the economic costs of marital breakdown to the individual and to society.

Let us look more closely at the costs that are the primary focus of this Article: the economic costs to the spouse who has sacrificed or compromised her career in order to further the interests of her marriage. There is a tendency to think of the economic issues arising out of divorce as involving determinations as to how the economic wealth of a marriage is to be distributed. This analysis

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74. G. CALABRESI, *THE COSTS OF ACCIDENTS* (1970).

75. *Id.* at 26.

76. *Id.* at 27.

77. *Id.* at 28.

may be quite appropriate in cases where there is substantial tangible property to divide. However, where one spouse has given a low priority to her own interests in the long term interest of the marriage, and at the end of the marriage there is little tangible property, that spouse suffers a loss. The question at divorce, then, should be how to distribute this loss rather than how to distribute gains.

Spouses who have forgone or scaled down their own career development in favor of that of their spouses suffer many kinds of losses. Sometimes there have been direct contributions of money to the other spouse. In other cases, the spouse may have lived a life deprived of material assets that would otherwise have been available.<sup>78</sup> There is often a residual loss in earning capacity during the period she remains outside of the workplace or pursues her career in a less intense way than would have been the case absent family responsibilities.<sup>79</sup> If she later makes a decision to undertake professional or other specialized training, she may be faced with inflated tuition and other increased costs.<sup>80</sup> In general, to the extent that priorities were set to benefit the enhanced spouse, the other spouse lost the benefits that might have inured to her had the priorities in the marriage been different.<sup>81</sup>

In drastic cases, the economic dislocation experienced by the economically weaker spouse at the end of a marriage can also affect the larger society. In the most extreme cases, the public may have to support women, often with children, who are unable to support themselves. The "feminization of poverty" has become an issue commanding national attention.<sup>82</sup> Even in less extreme cases, there can be societal costs. The physical, financial and emotional stresses on custodial mothers can be substantial. Although many function admirably in the face of these difficulties, in some instances, parenting capabilities may be adversely affected. This can have a negative impact on long term developmental processes in their children.<sup>83</sup>

Divorce also has administrative or tertiary costs. Although no-fault has reduced the litigation formerly necessary to prove fault grounds, terminating a marriage can still be expensive. In a case involving the equitable distribution of

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78. See Batts, *Remedy Refocus: In Search of Equity in "Enhanced Spouse/Other Spouse" Divorces*, 63 N.Y.U. L. REV. 751, 762-63 (1988).

79. See Ellman, *supra* note 13, at 49.

80. Batts, *supra* note 78, at 793.

81. A few courts have phrased the contributions of the non-enhanced spouse in terms analogous to injury and loss. In *Haugan v. Haugan*, 117 Wis. 2d 200, 343 N.W.2d 796 (1984), for example, the court said that "a spouse who has been handicapped socially and economically by his or her contributions to a marriage shall be compensated for such contributions at the termination of the marriage insofar as this is possible." *Id.* at 208, 343 N.W.2d at 800 (misquoting Legislative purpose, ch. 105, § 1 (1977) of Divorce Reform Act). In a sense, the spouse who has sacrificed her individual career prospects is, with a no-fault gloss, like the tort plaintiff who has suffered the loss of an opportunity as a result of a defendant's actions. Thus, there are tort cases where, for example, the defendant physician failed to perform tests that would have revealed that the plaintiff had a condition that would have been amenable to early treatment. As a result, the plaintiff's chances for recovery were lost or diminished. In the context of divorce, the spouse who has forgone career opportunities has, by virtue of divorce, also lost the chance to maximize her possibilities.

82. See, e.g., McLindon, *supra* note 46, at 404 (noting that unfair child support awards can result in poverty). See generally Ehrenreich & Piven, *supra* note 46.

83. See, e.g., J. WALLERSTEIN & J. KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* (1980); J. WALLERSTEIN & S. BLAKESLEE, *SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE* (1989).

property, substantial money may be spent on lawyers, appraisers, and other professionals to determine the value of real estate, other financial investments, and professional practices. Since there is no legal theory that clearly provides the basis for an award of alimony, and limited duration alimony has gained some popularity in recent years,<sup>84</sup> more money may have to be spent to demonstrate to the court that alimony is warranted or that it should be permanent. Finally, divorce also imposes administrative costs on society. Although no-fault has probably reduced the cost of individual divorces,<sup>85</sup> the increase in the divorce rate<sup>86</sup> has kept the administrative costs of divorce to society relatively high. Calabresi concluded that the losses occasioned by an accident should be placed on what he called the "cheapest cost avoider"—the party, as between the plaintiff and the defendant, who was in the best position to more cheaply take the steps necessary to avoid the accident.<sup>87</sup> He judged this strict liability to be appropriate on the grounds that it provided for immediate, certain recovery, and reduced litigation costs.<sup>88</sup> Calabresi's cheapest cost avoider model cannot simply be superimposed on the context of divorce. However, the focus of Calabresi and others on developing approaches that avoid some of the disadvantages of a system based on proof of negligence was innovative and important.<sup>89</sup>

Once the fault element is removed from divorce, what remains is an accident—an unfortunate event that results in costs to the individual and to society. Just as tort scholars have sought to reduce the costs of accidents by separating fault from costs, a true no-fault approach to divorce costs should also separate costs from fault and focus on developing a no-fault analysis aimed at reducing and redistributing some of the economic losses associated with divorce.

## B. Tort Policies and Their Relevance

Once we acknowledge that in many ways tort law has moved toward no-fault and strict liability, it may be useful to examine tort goals, purposes, and policies to see whether they provide useful guidance in the divorce context. Different tort doctrines have embodied different purposes or goals, but there is con-

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84. See *infra* text accompanying notes 108-12.

85. Eliminating the requirement of proof of fault means a decrease in costs for the time spent by judges and other court personnel.

86. Between 1965 and 1985, the number of divorces increased from 479,000 to 1,190,000 annually. CENSUS, *supra* note 16, at 86. After a sharp increase between 1960 and 1980, changes in the divorce rate have been minimal. See *id.*

87. CALABRESI, *supra* note 74, at 311-12. A detailed discussion of Calabresi's solution would require more space than could be appropriately devoted to it in this Article. Essentially, he proposed that liability be determined by a system of categorical rules placing liability prospectively on specified parties for various kinds of accidents. For further discussion of Calabresi's approach see Michelman, *Pollution as a Tort: A Non-Accidental Perspective on Calabresi's Costs*, 80 YALE L.J. 647, 654-57 (1971). Not surprisingly, there has been substantial discussion of the question of how to determine who is the cheapest cost avoider. See *id.*; Calabresi, *Views and Overviews*, 1967 U. ILL. L. REV. 600.

88. CALABRESI, *supra* note 74, at 135-40, 261-63.

89. Franklin, *supra* note 73. It should be noted that these recent approaches to strict liability and no-fault insurance schemes are still controversial in tort law. See, e.g., Epstein, *Automobile No-Fault Plans: A Second Look at First Principles*, 13 CREIGHTON L. REV. 769, 789-90 (1980); Blum & Kalvan, *The Empty Cabinet of Dr. Calabresi: Auto Accidents and General Deterrence*, 34 U. CHI. L. REV. 239 (1967); see also Calabresi, *Fault, Accidents and the Wonderful World of Blum and Kalvan*, 75 YALE L.J. 216 (1965).



siderable overlap between policies used to justify strict liability and no-fault tort approaches.

The movement toward no-fault compensation schemes and strict liability in the 1960's and 1970's reflected numerous instrumental, fairness, and administrative concerns. In their 1965 landmark book, in which they advocated replacement of the negligence system with a no-fault system for addressing the problem of automobile accidents, Keeton and O'Connell emphasized the goals of compensation, reducing administrative and litigation costs, and promoting roughly comparable treatment for people who have suffered similar losses.<sup>90</sup>

The cases adopting strict liability in tort also reflect many different concerns which are balanced when determining whether to impose liability without fault in a particular context. In *Escola v. Coca Cola Bottling Co. of Fresno*,<sup>91</sup> the landmark concurring opinion of Justice Traynor explained the purposes of strict liability in the products liability context. His reasons for imposing liability without fault included the need for compensation of the individual suffering the loss, the difficulty of proving fault, the need to encourage defendants to take steps to reduce the relevant hazard, and the ability of the defendant to obtain insurance and thereby distribute its losses to the public as a cost of doing business.<sup>92</sup>

In another development, in *State, Department of Environmental Protection v. Ventron*,<sup>93</sup> the court held that landowners could be held strictly liable for harms arising from pollution on their property even if they do not know that the property is polluted. The policies articulated were decreasing the burden on the public fisc, providing compensation to innocent victims, and the greater ability of the defendants to prevent the harm.<sup>94</sup>

If we analyze these rationales as a set, the move away from fault-based liability reflects an attempt to accommodate diverse goals including compensation, deterrence, reduction of litigation costs, fairness, reliance, and consistency. Where strict liability is imposed, it is not because of fault, but as a matter of public policy. An analysis of the goals of strict liability can also be persuasive in the context of divorce. However, before analyzing each of these goals and their application to no-fault divorce, it is important to understand why alternative

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90. R. KEETON & J. O'CONNELL, BASIC PROTECTION, *supra* note 25, at 1-5. See also R. KEETON, J. O'CONNELL & J. MCCORD, CRISIS IN CAR INSURANCE v (1968).

91. 24 Cal.2d 453, 150 P.2d 436 (1944).

92. *Id.* at 462-63, 150 P.2d at 440-41 (Traynor, J., concurring). The Restatement (Second) of Torts also stated the rationale for strict liability in the products context:

On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the product.

RESTATEMENT (SECOND) OF TORTS, § 402A comment c (1977).

93. 94 N.J. 473, 468 A.2d 150 (1983).

94. *Id.* at 488, 497, 499, & 468 A.2d at 157, 162, & 163-64.

modes of legal analysis have not proven sufficient to provide a justification for alimony.

### III. THE INADEQUACY OF EXISTING RATIONALES

The problem of achieving economic fairness for divorced women has commanded the attention of many writers, yet solutions have proved elusive. Neither community property nor equitable distribution are very helpful to women in marriages in which little property has been accumulated.<sup>95</sup> While the debate over the treatment of professional degrees has received substantial attention,<sup>96</sup> the reality is that this issue is relevant in relatively few marriages.<sup>97</sup> In recent years, divorce has been analogized to the termination of a contract and the dissolution of a partnership. There has been exploration of the use of quasi-contract remedies. Theories of restitution, rehabilitation, human capital, and encouraging sharing behavior have been invoked. For some skeptical of the judicial system, there has been increased exploration of the option of the antenuptial contract—an option in which the parties themselves contract in advance of the marriage concerning economic settlement in the event of divorce.

All of these approaches have significant potential to improve the economic awards to some financially disadvantaged spouses upon divorce. Yet, none of these approaches has provided a convincing theoretical or practical basis for alimony.

95. Weitzman's critique of the effects of no-fault in California illustrates the problem with the community property system. Initially, one might think that a community property system, in which tangible assets are split evenly, would provide adequate protection for divorced women. However, as Weitzman and others have noted, equal division of the marital property has often required the sale of the marital home. This frequently resulted in a decline in the standard of living that the economically weaker spouse had little likelihood of improving. *THE DIVORCE REVOLUTION*, *supra* note 14, at 78-96. *See also* Fineman, *supra* note 47, at 833-42 (criticizing Wisconsin rule requiring equal division of property upon divorce).

Nor has equitable distribution, which was adopted by many states about the same time as no-fault, been a panacea. In recent years, equitable distribution has also been criticized as unfair to women. *See, e.g.*, *THE DIVORCE REVOLUTION*, *supra* note 14, at 106-09 (citing studies in both New York and New Jersey concluding that, under equitable distribution, wives were typically being awarded less than half the tangible property). *See also* Glendon, *Family Law Reform in the 1980's*, 44 *LA. L. REV.* 1553, 1555-57. Most equitable distribution statutes state the factors courts should consider in dividing property, but provide no guidance as to how those factors should be weighed or as to what the goal is other than fairness. As a result, the decision of the court as to how marital property is to be divided is very dependent on judicial discretion. *See THE UNIF. MARRIAGE AND DIVORCE ACT* § 307, 9A *U.L.A.* 238-39 (1987).

96. *See, e.g.*, *Graham v. Graham*, 194 *Colo.* 429, 574 *P.2d* 75 (1978); *O'Brien v. O'Brien*, 66 *N.Y.2d* 576, 489 *N.E.2d* 712, 498 *N.Y.S.2d* 743 (1985). *See also* Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 *U. KAN. L. REV.* 379 (1980); Erickson, *Spousal Support Toward the Realization of Educational Goals: How the Law Can Insure Reciprocity*, 1978 *WIS. L. REV.* 947 (1978).

97. The professional degree issue is only relevant in those marriages in which one spouse puts the other through school and the marriage ends before any significant marital property can be accumulated. Most courts that have addressed the issue have determined that professional degrees do not constitute marital property. *See, e.g.*, *Mahoney v. Mahoney*, 91 *N.J.* 488, 453 *A.2d* 527 (1982); *Archer v. Archer*, 303 *Md.* 347, 493 *A.2d* 1074 (1985). So far, New York stands alone in its determination that professional degrees are marital property. *O'Brien v. O'Brien*, 66 *N.Y.2d* 576, 489 *N.E.2d* 712, 498 *N.Y.S.2d* 743 (1985).

### A. Contract

Under the contract analysis, marriage is compared to a civil contract.<sup>98</sup> Upon dissolution, remedies are sought to protect the spouse's "expectancy interests" in the marriage.<sup>99</sup>

The contract analysis of intimate relationships has been criticized in some detail.<sup>100</sup> It has been argued, for example, that it is difficult to define with specificity the promise sought to be enforced when alimony is awarded at the end of a marriage.<sup>101</sup> There is also a problem in defining exactly what constitutes a breach of a marital agreement in a way that does not let consideration of fault in by the back door.<sup>102</sup>

A different kind of contract analysis is based on the parties entering into an antenuptial contract addressing the issue of alimony. But the option of planning for alimony by an antenuptial contract or a contract entered into during the marriage is also problematic. First, some courts refuse to enforce contracts dealing with support obligations after divorce.<sup>103</sup> Another problem is determining what happens to the agreement in the event of changed circumstances. The law has not yet developed an adequate approach to this complex issue.<sup>104</sup> Perhaps the most difficult problem facing those who would rely on the antenuptial contract is the potential inequality in bargaining power between the spouses. Because of their generally stronger economic position, men are likely to have more bargaining power than women in negotiating antenuptial agreements. The courts have made no consistent determination as to the degree to which they will be willing to apply traditional contract law principles to alleviate this prob-

98. There are a number of cases in which one spouse has sought to assert a contract claim against the other in divorce. *See, e.g., Pyeatte v. Pyeatte*, 135 Ariz. 346, 350-53, 661 P.2d 196, 200-03 (Ct. App. 1982) (contract claim failed on the facts, but award was made on the basis of unjust enrichment). Some courts decline to follow the contract analysis. *See, e.g., McDermott v. McDermott*, 129 Ariz. 76, 628 P.2d 959 (Ct. App. 1981). For further discussion of the application of contract principles to intimate relationships, see L. WEITZMAN, *THE MARRIAGE CONTRACT: SPOUSES, LOVERS AND THE LAW* (1981); Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204 (1982); Temple, *Freedom of Contract and Intimate Relationships*, 8 HARV. J.L. & PUB. POL'Y 121, 153 (1985). *See also* Fleischmann, *Marriage by Contract: Defining the Terms of the Relationship*, 8 FAM. L.Q. 27 (1974); Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1518-19 (1983); Brinig & Carbone, *supra* note 22.

Weitzman, Shultz, Temple and Fleischman have argued that spouses should be able to structure the terms of their ongoing marriage by contract. However, the courts continue to refuse to enforce contracts that purport to alter the traditional duties of support and services. RESTATEMENT OF CONTRACTS, § 587 (1932) ("A bargain between married persons or persons contemplating marriage to change the essential incidents of marriage is illegal"). *See also* Graham v. Graham, 33 F. Supp. 936 (E.D. Mich. 1940). *See supra* note 6.

99. *See, e.g., Brinig & Carbone, supra* note 22. In this article, the authors advocate application of contract damages principles to alimony. However, they concede that under no-fault statutes, the basis for spousal support is not clear. *Id.* at 894 n.152.

100. *See* Ellman, *supra* note 13, at 13-33; Chambers, *The "Legalization" of the Family: Toward a Policy of Supportive Neutrality*, 18 U. MICH. J.L. REF. 805, 820-23 (1985); Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1161-69 (1981).

101. *See* Ellman, *supra* note 13, at 16-23. This assumes that the promise is not a mere promise to remain married, but is also a promise that reflects more specific understandings between the spouses.

102. *See* Ellman, *supra* note 13, at 23-24.

103. *See, e.g., Connolly v. Connolly*, 270 N.W.2d 44 (S.D. 1978); *Duncan v. Duncan*, 652 S.W.2d 913 (Tenn. Ct. App. 1983).

104. *See, e.g., Perry, Dissolution Planning in Family Law: A Critique of Current Analyses and a Look Toward the Future*, 24 FAM. L.Q. 77 (1990).

lem. Where serious bargaining disparities exist, contracting can be dangerous since the contract may only serve to formalize a power imbalance that already exists between the spouses.<sup>105</sup> Finally, the application of contract law to divorce continues to be limited by the fact that to a large extent, the law continues to analyze marriage not as a contract but as a status.<sup>106</sup>

Although the contract approach to marriage has proved a popular one and contract law has definitely become more flexible in recent years,<sup>107</sup> family law must be cautious in placing too much emphasis on this analogy. Even contract scholars like Grant Gilmore have commented on the growing obsolescence of much of contract doctrine and have noted the growing merger of contract into tort.<sup>108</sup>

### B. *Reimbursement and Rehabilitative Alimony and Restitution Theory*

In recent years, there has been the emergence of two new alimony doctrines: restitution alimony and rehabilitation alimony. These doctrines are indeed controversial. On the one hand, they may be thought of as rationales to justify awards of alimony in situations where there might otherwise be no award. On the other hand, they can provide rationales for making alimony awards of limited duration, in contrast to the traditional award that continued until remarriage or death.

A specific doctrine of restitution, or reimbursement, alimony has been applied by some courts in cases involving professional degrees.<sup>109</sup> Under this doctrine a spouse who has underwritten the costs of the other spouse's education is reimbursed for her expenses.<sup>110</sup> However, reimbursement alimony is a limited

105. Antenuptial contracts present a number of other problems. It is not clear, for example, how contract doctrines such as impossibility, impracticability and unconscionability will apply to antenuptial contracts. *Id.* at 100-05.

106. See Ellman, *supra* note 13, at 13. However, the recent history of marriage has been described as moving, in many ways, from status to contract. See, e.g., Fineman, *supra* note 47, at 796; GLENDON, *supra* note 19, at 101-18.

107. For a discussion of the ways in which contract law is becoming more flexible, see Shultz, *supra* note 98; Temple, *supra* note 97.

108. See G. GILMORE, *THE DEATH OF CONTRACT* (1974). The attempt to move the analysis of family law issues closer to evolving approaches to tort law can be placed within a larger jurisprudential context. In *The Death of Contract*, Grant Gilmore contended that there has been a gradual dismantling of the formal system of contract theory, in which there was substantial reliance on formalisms such as offer, acceptance and consideration. *Id.* at 65-66. He argued that these formalisms are being replaced by a broader view of laws, especially remedies. As a result of doctrines such as quasi-contract, unjust enrichment, and promissory estoppel, contract and tort are essentially becoming one. *Id.* at 87-88. Moreover, Gilmore argued that tort law is gaining ascendancy. He gives the example of the area of products liability, where strategies for recovery have rapidly gone from emphasizing contract warranty theories to focusing more on tort theory. See *id.* at 92-94. He also notes the expansion of tort through § 402A of the Restatement (Second) of Torts and the use of increasingly liberal interpretations of its provisions to impose liability on more defendants. *Id.* at 92-94.

This does not mean that we should abandon the search for contract remedies in the marriage context. Despite the criticisms, there are analogies between commercial contracts and intimate relationships that deserve further exploration. The point is that contract doctrine cannot be simply superimposed onto the family law context. Family law must develop *sui generis* principles to govern its own needs. These principles can borrow from other areas, whether contract, property, tort, or any other.

109. See, e.g., *Mahoney v. Mahoney*, 91 N.J. 488, 453 A.2d 527 (1982).

110. See, e.g., *id.*; *Pyeatte v. Pyeatte*, 135 Ariz. 346, 353-54, 661 P.2d 196, 203-04 (Ct. App. 1982).

remedy, which may not include many of the actual expenses incurred.<sup>111</sup> It also does not cover the opportunity costs and other possible measures of losses that may have been suffered by the spouse who financially assisted the other. As a practical matter, restitution alimony would be relevant in only a small number of divorces.

The goal of rehabilitative alimony is to restore the wife to economic independence by requiring the husband to pay alimony for a limited period. During this period, the wife is expected to undertake education or training that will make her economically self-sufficient.<sup>112</sup> Not surprisingly, rehabilitative alimony has been sharply criticized.<sup>113</sup> It is obviously unrealistic to think that a longtime housewife will cover her divorce losses by obtaining a college degree at the age of fifty. Even in less extreme cases, this remedy does little to reduce the disproportionate losses many women suffer. In addition, the term "rehabilitative" may seem to some to make the alimony recipient sound like either a victim or a criminal.

A more general doctrine of restitution as a basis for alimony in cases not involving professional degrees also invites criticism. Restitution requires that three elements be proved: that defendant received a benefit; that the benefit was conferred at the plaintiff's expense; and that defendant's retention of the benefit would be unjust.<sup>114</sup> The third element often presents a problem because retention of a benefit is not deemed unjust if the benefit was conferred with donative intent.<sup>115</sup> The court's analysis of this issue depends on a judge's own subjective views as to whether one spouse's actions that benefit the other are done with donative intent or with an expectation of benefit.<sup>116</sup> Such subjective determinations establish no clear legal right to alimony in cases involving spousal sacrifice.

### C. Partnership

A number of writers have analogized a divorce to the termination of a partnership.<sup>117</sup> Under this approach, the capital contributions and all assets of the partnership are divided between the partners.

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111. For example, Indiana limits reimbursement to tuition, books and laboratory fees. See IND. CODE ANN. § 31-1-11.5-11(d) (Burns 1990).

112. See, e.g., *Reback v. Reback*, 296 So. 2d 541, 543 (Fla. Dist. Ct. App. 1974); *McDowell v. McDowell*, 670 S.W.2d 518 (Mo. Ct. App. 1984).

113. See, e.g., Note, *Rehabilitative Alimony: An Old Wolf in New Clothes*, 13 REV. L. & SOC. CHANGE 667 (1985). See also, *Avirett v. Avirett*, 187 N.J. Super. 380, 383, 454 A.2d 917, 919 (1982) (describing rehabilitative alimony as male-oriented and sexist).

114. *Casad, Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again?*, 77 MICH. L. REV. 47, 52 (1978).

115. *Id.* at 53.

116. See *Ellman*, *supra* note 13, at 24-28.

117. See *Weitzman, Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169, 1255-58 (1974); *Sharp, The Partnership Ideal: The Development of Equitable Distribution in North Carolina*, 65 N.C.L. REV. 195, 198-201 (1987); *Krauskopf, A Theory for "Just" Division of Marital Property in Missouri*, 41 MO. L. REV. 165 (1976). The partnership analogy has also proved attractive to some courts in their analysis of divorce. See, e.g., *O'Brien v. O'Brien*, 66 N.Y.2d 576, 585, 489 N.E.2d 712, 716, 498 N.Y.S.2d 743, 747 (1985); see also *Rummel v. Rummel*, 265 N.W.2d 230 (N.D. 1978).

The partnership analogy has also been criticized.<sup>118</sup> It has been noted, for example, that marriage has a wider range of objectives than a mere business partnership.<sup>119</sup> Marriages tend to begin with implicit assumptions about roles and expectations, whereas business partnerships generally begin with explicit negotiations about such matters.<sup>120</sup> Also, many business partnerships plan for dissolution at the outset.<sup>121</sup> It has been argued that the partnership model does not support awards of alimony because after the fruits of the relationship have been divided in a business partnership, each party goes his separate way with no continuing obligation to the other.<sup>122</sup> Forcing a husband to continue to support his ex-wife is inconsistent with the partnership model.

#### D. *Human Capital Theory*

There are a number of approaches to this theory.<sup>123</sup> Human capital theory is based on the idea that when a wife underwrites the cost of professional training of her husband or withdraws from the paid labor force in order to devote herself to domestic responsibilities, she invests in her husband's "human capital" rather than her own.<sup>124</sup> Upon divorce, she should receive a return on her "investment" in the family firm. The theory has been criticized as being overly focused on quantitative measurements which require expensive expert testimony and as not being useful for taking into account less tangible, but nonetheless important, contributions.<sup>125</sup>

#### E. *Sharing Principles*

A number of writers have argued that divorce remedies should be based on the idea that marriage is a relationship in which the sharing of responsibilities is critical. Under this approach, one purpose of the laws governing divorce should

118. See Batts, *supra* note 78, at 756 n.21; Fineman, *supra* note 47, at 836-42. But cf. Grant, *How Much of a Partnership is Marriage?: Community Property Rights Under the California Family Law Act of 1969*, 23 HASTINGS L.J. 249 (1971).

119. Under traditional partnership law, the relationship must be for the purpose of profit. See J. CRANE & A. BROMBERG, *LAW OF PARTNERSHIP* 63 (1968). Although enhancing financial well-being may be a goal of one or both marriage partners, most people would probably agree that profit is not the primary goal of the marriage relationship.

120. See GLENDON, *supra* note 19, at 65.

121. O'Connell, *supra* note 5, at 497.

The partnership analysis has also been characterized as not helpful in the professional degree context. There, the marriage is often dissolved before any substantial assets have been accumulated. Under the partnership analysis, no profits have been realized and the "capital contribution" of the sacrificing spouse may be considered too diffuse and intangible to be recognized. See Weitzman, *supra* note 117, at 1258; Batts, *supra* note 78, at 756 n.21.

122. O'Connell, *supra* note 5, at 499.

123. See, e.g., Landes, *Economics of Alimony*, 7 J. LEGAL STUDIES 35 (1978); Combs, *The Human Capital Concept as a Basis for Property Settlement at Divorce: Theory and Implementation*, 2 J. DIVORCE 329 (1979); Krauskopf, *supra* note 96; Parkman, *The Recognition of Human Capital as Property in Divorce Settlements*, 40 ARK. L. REV. 439 (1987); Beninger & Smith, *supra* note 18.

124. Krauskopf, *supra* note 96, at 387-88.

125. See O'Connell, *supra* note 5, at 503; see also Parkman, *supra* note 123, at 450-53, 457-67 (criticizing a number of human capital models).

be to encourage and reward sharing behavior.<sup>126</sup> The argument is that whenever spouses have different earning capacities and want to plan rationally as a single economic unit, they will decide to shift career emphasis to the higher earning spouse. Therefore, the lower earning spouse is more likely to either play the traditional role of homemaker, or at least, carry a disproportionate share of the domestic responsibilities.<sup>127</sup> Under sharing principles, this pattern represents an economically rational choice to maximize family income. Alimony constitutes compensation at divorce for the loss in earning capacity arising from such sharing behavior.<sup>128</sup> Although this approach is attractive, its basis in the law seems unclear. Although many courts may acknowledge the need for sharing in marriage, they may be less willing to adopt sharing as the theoretical basis for alimony without it being linked more closely to established principles of law.

#### F. Return to the Fault System

Some writers have advocated a return to the fault system.<sup>129</sup> Such a move is unlikely. Moreover, a return to fault will not insure that more needy spouses will be awarded alimony.

First, it must be noted that even under the fault system, awards of alimony were relatively rare.<sup>130</sup> It has been argued that women were no better off,<sup>131</sup> and even might have been worse off under fault. Since alimony was awarded only to an "innocent spouse," a number of women could not be awarded alimony regardless of their need or their contributions to the marriage.<sup>132</sup> For example, continuation of alimony was sometimes linked to post-divorce sexual conduct.<sup>133</sup> Also, women who failed to perform what were viewed as their "proper" marital duties might not be awarded alimony.<sup>134</sup>

Although divorce is economically devastating for many women, reinstituting fault would be unlikely to result in fewer divorces. The spiraling divorce rate is a reflection of many factors, not simply the ease with which a divorce may be obtained.<sup>135</sup> Finally, a number of the reasons for enacting no-fault divorce were

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126. For articles stressing sharing principles, see, for example, Ellman, *supra* note 13; Laughrey, *Uniform Marital Property Act: A Renewed Commitment to the American Family*, 65 NEB. L. REV. 120 (1986); Prager, *Sharing Principles and the Future of Marital Property Law*, 25 UCLA L. REV. 1, 2-14 (1978) (sharing principles reflect and reinforce important characteristics of marriage).

127. Ellman, *supra* note 13, at 45-47.

128. *Id.* at 3.

129. See *supra* note 59.

130. Singer, *supra* note 22, at 1106.

131. Kay, *supra* note 55, at 67 (expresses doubt that women fare substantially better after divorce in states that permit fault divorce or that permit consideration of fault in economic determinations than in "pure" no-fault states).

132. Singer, *supra* note 22, at 1110.

133. See, e.g., *Atkinson v. Atkinson*, 13 Md. App. 65, 71, 281 A.2d 407, 410 (1971) (noting that post-divorce "flagrant misconduct" may justify revocation or modification of alimony); *Lindbloom v. Lindbloom*, 180 Minn. 33, 35-36, 230 N.W. 117, 118 (1930) (post divorce sexual conduct may be a factor in terminating alimony).

134. Singer, *supra* note 22, at 1112-13. It should be noted that despite her criticisms of no-fault divorce, Weitzman does not advocate a return to fault. Rather, her position seems to be that the retention of fault grounds in states that still have them might offer women some protection. See *THE DIVORCE REVOLUTION*, *supra* note 14, at 383.

135. Other factors contributing to the higher divorce rate include changing social mores and the increased economic independence of women. These were also factors contributing to the enactment of no-fault divorce. See

good ones. Granting increased recognition to personal autonomy and eliminating sham trials and the perjury they encouraged were positive developments for individuals, the legal system, and society as a whole.

#### IV. ANALYSIS OF TORT GOALS

In tort law, there are a number of contexts where strict liability has been applied to hold one party liable for the losses of another without proof of fault, but the parameters of strict liability are still unclear. The courts are still struggling with the question of how far and to what kinds of activities strict liability can extend.<sup>136</sup> Moreover, mere application of the doctrine to a particular area does not ensure that injured parties invoking it will be compensated. In products liability, for example, the plaintiff still must prove that the product in question is "defective,"<sup>137</sup> and still must meet the traditional tort requirements of causation-in-fact and proximate cause.<sup>138</sup> However, even though many aspects of strict liability remain unsettled, there is substantial similarity between the goals sought to be furthered by that doctrine<sup>139</sup> and the goals of divorce that would be furthered by a strict liability approach to alimony.

Under a strict liability approach, alimony can be seen as a remedy to compensate a spouse suffering disproportionate losses<sup>140</sup> as a result of the accident of divorce. Alimony, like tort damages, serves the function of income replace-

*supra* text accompanying notes 40-42. See also Frank, Berman & Mazur-Hart, *NoFault Divorce and the Divorce Rate: The Nebraska Experience—An Interrupted Time Series Analysis and Commentary*, 58 NEB. L. REV. 1, 25-30 (1978); McGraw, Sterin & Davis, *A Case Study in Divorce Law Reform and its Aftermath*, 20 J. FAM. L. 443 (1981-82).

136. Courts have started to address issues such as whether strict liability applies to bailors and lessors of goods, *see, e.g.*, *Price v. Shell Oil Co.*, 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970); sellers of used goods, *see, e.g.*, *Tillman v. Vance Equip. Co.*, 286 Or. 747, 596 P.2d 1299 (1979); franchisors, *see, e.g.*, *Kosters v. Seven-Up Co.*, 595 F.2d 347 (6th Cir. 1979); and contractors following specifications, *see, e.g.*, *Michalko v. Cooke Color & Chemical Corp.*, 91 N.J. 386, 451 A.2d 179 (1982). Compare *Elmore v. American Motors Co.*, 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969) (extension of strict liability to bystanders) with RESTATEMENT (SECOND) OF TORTS § 402A (1977) (taking no position on the bystander issue).

Indeed, to some extent, the whole doctrine of strict liability remains controversial. *See, e.g.*, Posner, *A Theory of Negligence*, 1 J. LEGAL STUDIES 29 (1972).

137. The plaintiff must prove that the product is in "a defective condition unreasonably dangerous." *See* RESTATEMENT (SECOND) OF TORTS § 402A (1977); W. PROSSER & P. KEETON, *supra* note 72, at 695.

138. *Winnett v. Winnett*, 57 Ill. 2d 7, 310 N.E.2d 1 (1974); *Comstock v. General Motors Corp.*, 358 Mich. 163, 99 N.W.2d 627 (1959); W. PROSSER & P. KEETON, *supra* note 72, at 710. Also, under certain circumstances, plaintiff's own conduct will bar or reduce his recovery. But the question of what defenses are available in strict liability is a complex one. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS, §§ 523, 524 (1977); *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978). *See also*, Note, *Assumption of Risk and Strict Products Liability*, 95 HARV. L. REV. 872 (1982).

139. Obviously, these different tort goals overlap to some extent. For example, fairness and compensation are both goals of tort law. But fairness can also be described as a goal of compensation. *See, e.g.*, James, *Damages in Accident Cases*, 41 CORNELL L.Q. 582, 583 (1956) (it is "eminently fair that these damages should (at least) put the plaintiff, as nearly as may be, in the same position he would have been in if defendant's wrong had not injured him").

140. The argument is not that the economically more powerful spouse suffers no losses at the time of divorce. For many middle class couples, the income that supported one household rather comfortably simply cannot support two households at the same level. However, there is empirical research that suggests that, for many men, any initial economic losses suffered at the time of divorce are soon made up. *See infra* note 167. Even assuming that both spouses continue to suffer long term economic losses, the spouse who has invested in the marriage at the expense of her career suffers a disproportionate loss.



ment in a context where there is good reason to compensate the individual suffering the loss, and good reason to impose the cost on the other party.

A rationale for alimony based on strict liability is not designed to completely supplant the other theories of alimony analyzed in Part Three of this Article. Those theories have been criticized, but it must be remembered that they are relatively new and still evolving. Just as it has been shown that fitting any one of them to the family law context is problematic, a theory based on strict liability is also not a perfect fit. The point is simply that family law can draw on certain principles underlying strict liability that address analogous concerns.<sup>141</sup> The challenge here, as with the other approaches, is to adapt principles drawn from other areas to the family law context.<sup>142</sup>

The issue of alimony can arise as a result of any one of the typical middle or upper middle class marriage patterns summarized in the Introduction to this Article. One pattern is where one spouse has made very specific, identifiable sacrifices in favor of the marriage, such as working while the other spouse attends graduate or professional school. In another pattern, the sacrifices of the wife may be more diffuse. The homemaker who takes care of the home may provide an environment of relative comfort and stability which enables the other spouse to concentrate on building his career. A third marriage pattern is one in which both spouses work, and there are children. Here the wife is still more likely than the husband to spend a disproportionate amount of time on domestic duties, including child care.<sup>143</sup> As a result, she invests less in her career than her husband does in his. Some two-earner marriages may not fit into this sacrifice/compromise model. In such cases, the wife often suffers economic loss upon divorce because of general marketplace disparities between the incomes of men and women, rather than because of the role she played in the marriage.<sup>144</sup> Although the disadvantaged spouse in each of these marriage patterns may have a legitimate claim to alimony, not all of the strict liability rationales apply equally to each context.

Finally, the strict liability approach developed in this Article should apply regardless of which spouse makes the decision to terminate the marriage. It is true that much of the discussion in this Article is premised on a set of facts in which the husband ends the marriage after the wife has made a substantial investment and has yet to reap her rewards. Although it seems reasonable to assume that fewer middle-aged women walk out on their husbands than vice-versa, it certainly must be acknowledged that there are women who make the

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141. See *supra* text accompanying notes 90-93.

142. The need for development of new doctrine was noted by Professor Robert Levy, who was the Reporter in connection with the drafting of the 1970 Uniform Marriage and Divorce Act. Noting the loss of bargaining power of wives as a result of no-fault, he noted the importance of the issue of "[H]ow to provide adequate, long-term financial protection for the 'innocent' wife who can be divorced against her will by virtue of new, non-fault grounds for divorce. . . . [S]atisfactory resolution of this problem will require path-breaking and imaginative divorce-property doctrines." R. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS, app. B, B-1 to B-18 (1969) (document prepared for the Special Committee on Divorce of the National Conference of Commissioners on Uniform State Laws), (cited in *Kay, supra* note 43, at 46).

143. See generally A. HOCHSCHILD & A. MACHUNG, THE SECOND SHIFT: INSIDE THE TWO-JOB MARRIAGE (1989); R. HERTZ, MORE EQUAL THAN OTHERS: WOMEN AND MEN IN DUAL CAREER MARRIAGES (1986).

144. See *infra* notes 181-84.

decision to terminate their marriages. This happens even under circumstances where the women know that they will suffer serious economic disadvantage.

The question as to which party actually takes formal steps to terminate the marriage should be irrelevant under a no-fault, strict liability analysis. An advantage of strict liability is that it places the focus not on the conduct of the parties, but on the losses suffered. Thus, the question of whether it was the wife or the husband who made the decision to end the marriage should be irrelevant. Under the sacrifice/benefit paradigm, a wife who terminates her marriage should still be compensated for economic loss.

### A. *Compensation and Loss Sharing*

Compensation for losses is obviously one of the primary goals of tort law.<sup>145</sup> Although there is a growing willingness to compensate for psychological harm,<sup>146</sup> the focus of compensation in most tort cases remains on economic loss.<sup>147</sup> An important part of economic loss is the loss of future earnings or diminution in earning capacity.<sup>148</sup>

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145. AMERICAN BAR ASSOCIATION, TOWARD A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW 4-29 (1984) [hereinafter TOWARD A JURISPRUDENCE OF INJURY]. See, e.g., *United States ex rel. Jones v. Rundle*, 453 F.2d 147, 150-51 n.11 (3rd Cir. 1971) ("the underlying philosophy of tort law . . . is that the plaintiff should be compensated for the harm he has suffered").

146. See, e.g., *Battalla v. State of New York*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961) (abandoning physical impact rule); *Bovsun v. Sanperi*, 61 N.Y.2d 219, 461 N.E.2d 843, 473 N.Y.S.2d 357 (1984) (permitting recovery if plaintiff was within the zone of danger). California has had a very interesting evolution of the issue of emotional harm beginning with *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); see generally, Bell, *supra* note 70.

147. Obviously, many divorces are accompanied by emotional pain. The question could be raised as to whether, under a tort analogy, recovery would be permitted for emotional loss. In tort law there is an increased willingness to allow recovery for emotional harm. See *supra* note 146. Moreover, some feminist scholars have emphasized conceptions of the law that give increased recognition to the importance of attachments, interconnectedness and emotional interdependence. See, e.g., Finley, *Transcending Equality Theory: A Way Out of the Maternity and Workplace Debate*, 86 COLUM. L. REV. 1118, at 1159-61; Minow, "Forming Underneath Everything That Grows:" *Toward a History of Family Law*, 1985 WIS. L. REV. 819, 893. In the kinds of marriage patterns described in the Introduction to this Article, the wife who has compromised her own goals in favor of her marriage may suffer feelings of anger, loss, and disappointment in addition to her economic losses. Her opportunity to enter another marriage relationship may be minimal and she may also lose whatever psychic benefits she would have derived from being, for example, the wife of a business executive. Meanwhile, the husband retains the psychic benefits of his professional status and his chances for remarriage are likely to be greater. See *infra* text accompanying notes 167-70. Wallerstein has identified patterns of resentment in some divorced women so severe as to impair effective parenting for years. See *supra* text accompanying note 83. Although emotional harm may be difficult to measure for the purpose of damages, this has not posed a barrier to recovery in the tort context. There it has been noted that compensation for psychological injury may serve the purpose of restoring a level of satisfaction to life in general, and of replacing areas of satisfaction that the accident had taken away. See generally, Bell, *supra* note 70, at 398. However, finding a legal basis to support recovery for emotional losses in the context of divorce is difficult. It is widely understood that divorce is often accompanied by at least some degree of emotional pain to either or both spouses regardless of which spouse made the decision to end the marriage. Moreover, although the law varies from state to state, the trend has been to eliminate causes of action based on hurt feelings arising out of the breakdown of intimate relationships. See W. WADLINGTON, DOMESTIC RELATIONS 105-22 (1984).

148. See, e.g., *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983); *United States v. Varner*, 400 F.2d 369, 373 (5th Cir. 1968); D. DOBBS, HANDBOOK OF REMEDIES § 8.1 (1973).

Although the terminology of "compensation" is not always used, family law also clearly recognizes that compensation is an important divorce goal.<sup>149</sup> Thus, both the community property and the equitable distribution systems, though defective in operation, are theoretically designed to compensate the lower earning or homemaker spouse for her contributions to the marriage. The idea of compensation also underlies at least some of the theories or rationales that have already been advanced for alimony. Under a contract theory, alimony may be argued to constitute compensation for the losses caused by a breach of the marriage contract.<sup>150</sup> Under the "sharing theories," it is compensation for the losses caused by sharing behavior.<sup>151</sup>

In tort law, there are three parties who can bear the losses incurred as the result of an accident: the injurer, the victim<sup>152</sup> or society. Under the negligence system, the losses incurred as a result of an accident are shifted from the injured to the injurer only upon a finding of blameworthy behavior. However, under systems such as workers' compensation, automobile no-fault and other no-fault schemes, the losses are compensated in a different manner. They are paid for by what is essentially a system of insurance, one usually operated with some form of state involvement.<sup>153</sup>

But who should bear the burden of compensating the spouse who suffers losses at divorce as a result of sacrificing behavior? It could be argued that the economic losses resulting from a divorce should be spread among as large a number of people as possible. One potential loss-spreading device would be the development of public or private insurance programs designed to compensate spouses economically injured by divorce.<sup>154</sup> Obviously such a fund could not fully compensate particular individuals for all of their losses. However, payment of a lump sum might offset at least a few of the expenses incurred during the adjustment period immediately following a divorce. At this point in time, the

149. Sometimes courts do speak explicitly in terms of compensation. See, e.g., *Haugan v. Haugan*, 117 Wis. 2d 200, 318 N.W.2d 798 (1984) ("a spouse who has been handicapped socially and economically by his or her contributions to a marriage shall be compensated for such contributions at the termination of the marriage insofar as this is possible").

150. See *supra* text accompanying notes 98-102.

151. See *supra* text accompanying notes 126-28.

152. This includes the victim's family. In the absence of compensation from another source, the victim's family may have to bear the economic loss resulting from the loss or reduction in the victim's wages. The family may also have to replace, at cost, the services the victim once performed in the home.

153. See *supra* text accompanying notes 23-32. There are presently a number of other no-fault compensation programs to provide income replacement, at least temporarily, for those unable to provide for themselves because of injury or disease. Examples of these are state temporary disability schemes, employee sick leave or disability plans, illness and accident insurance, veteran's disability benefits, and social security benefits.

154. This possibility has been mentioned but never developed. In his preliminary report to the body that promulgated the Uniform Marriage and Divorce Act, Professor Robert Levy stated that "sound solutions to the problem of the dependent divorced spouse will ultimately be achieved not by reform of divorce-property doctrines, but by careful expansion of a nationwide social insurance system." R. LEVY, *supra* note 142, at 186. To date, however, no such programs have been enacted to cope with the economic losses resulting from divorce.

Accident compensation schemes have been proposed with respect to a wide variety of injuries. See, e.g., Meyer, *Regulating Catastrophes through Financial Requirements: A Model State Statute*, 20 HARV. J. ON LEGIS. 441 (1983) (nuclear accidents); Fleming, *Drug Injury Compensation Plans*, 30 AM. J. COMP. L. 297 (1982) (drug injuries); Soble, *A Proposal for the Administrative Compensation of Victims of Toxic Substance Pollution: A Model Act*, 14 HARV. J. ON LEGIS. 683 (1977) (injuries and diseases caused by toxic chemicals); Havighurst, "Medical Adversity Insurance"—Has its Time Come?, 1975 DUKE L.J. 1233 (medical malpractice).

immediate availability of funds could make the difference between the need to seek immediate employment and the option of educational training that could improve long term economic prospects.<sup>155</sup> An on-going monthly payment might make up some of the difference that would otherwise exist between pre- and post-divorce lifestyles.

It seems doubtful that a purely private system of divorce insurance would be effective. Insurance systems are generally based on the idea that many more people will pay into the system than will be paid money from it. With the high rate of divorce in recent years, it seems doubtful that private companies would find the divorce insurance business to be a profitable one.<sup>156</sup>

Another possibility would be the development of a public social insurance system. The idea that the Government might act as an insurer to compensate people for injuries is an old one in tort jurisprudence.<sup>157</sup> However, at present, the only form of public social insurance for divorce provided by the Government is welfare, or, for a few women whose marriages were of long duration, social security benefits.<sup>158</sup>

There are two ways that money could be raised for an insurance fund to assist divorced spouses. One possibility would involve taxing the activity that creates the risk: putting a tax on marriage. This could be a flat yearly tax on all married couples or a graduated tax based on income. One possible objection to this approach is that those whose marriages succeed would have to pay for those whose marriages fail. However, a structure where those who pay in do not necessarily get money out is already very much a part of the tax system in this country. Public assistance, for example, is paid for from general tax revenues. Similarly, all workers are required to pay into the social security system even though there is no guarantee that any particular person will live long enough to collect benefits.

The alternative would be to create a fund from general tax revenues. This approach would have the advantage of eliminating concerns as to whether taxing marriage would have a deterrent effect on the decision to marry. However, it does little to address other potential problems.

First, it is questionable whether sufficient funds could be collected to make a difference in the standard of living of a substantial number of divorced women. Current research indicates that the disparity between pre- and post-

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155. Singer, *supra* note 22, at 1119; THE DIVORCE REVOLUTION, *supra* note 14, at 206-07.

156. Insurance companies would likely be concerned about the problem of collusion. In the divorce context, this would mean that the spouses formally divorce for the purpose of collecting divorce insurance benefits, but continue thereafter to conduct their lives as husband and wife.

157. In his 1881 treatise, *The Common Law*, Oliver Wendell Holmes stated,

The state might conceivably make itself a mutual insurance company against accidents and distribute the burden of its citizen's mishaps among all its members. There might be a pension for paralytics, and state aid for those who suffered in person or estate from tempest or wild beasts. . . . The state does none of these things, however, and the prevailing view is that its cumbersome and expensive machinery ought not be set in motion unless some clear benefit is to be derived from disturbing the status quo. State interference is an evil where it cannot be shown to be a good. Universal insurance, if desired, can be better and more cheaply accomplished by private enterprise.

HOLMES, *THE COMMON LAW* 94-96 (1881).

158. See 42 U.S.C. §§ 402(b)(2)(1982).

divorce standards of living for many women can be quite substantial.<sup>159</sup> Another problem involves fairness: Should the amount of money a divorced spouse receives be tied to a pre-divorce standard of living or simply be a lump sum paid across the board? If the sum is tied to a pre-divorce standard, those needing the money least would probably end up getting the most. On the other hand, unless a person received enough money to make a difference in her standard of living, the program would serve little purpose.<sup>160</sup> Finally, at least initially, both spouses may suffer a loss in standard of living at the time of divorce.<sup>161</sup> Would either spouse be eligible for funds, or just the one whose standard of living has suffered most?<sup>162</sup>

The possibility of a social insurance system for reducing losses resulting from divorce does not seem to be a viable alternative. It would appear to be more realistic and effective to continue the loss-sharing approach in which the loss is shared by the other spouse. However, there is a need to adopt approaches that increase the likelihood that a substantial compensatory award will be made.

One of the rationales for strict liability in tort is that as between the plaintiff and the defendant, the loss should be placed on the party in the better position to bear it.<sup>163</sup> For example, products liability cases often involve institutional defendants such as manufacturers or retailers. Such defendants are usually in a stronger economic position than an individual plaintiff to bear the cost of an accident. In the context of a divorce, the party best able to bear the loss is the spouse who, post-divorce, is in the better financial position. This is likely to be the spouse who leaves the marriage with an enhanced career asset. It seems appropriate that this spouse should share the economic losses of the other.

The tort policy that the loss should be borne by the party in the best position to pay for it is not a total departure from doctrines already well established in family law. Many courts have long linked alimony awards to the ability to pay of the economically more powerful spouse.<sup>164</sup>

Another strict liability rationale for requiring the defendant to share the plaintiff's loss is that the defendant has the ability to distribute the loss by obtaining liability insurance, or by passing on the cost of the judgment by raising the price of his product.<sup>165</sup>

159. THE DIVORCE REVOLUTION, *supra* note 14.

160. If such a system were to be instituted, it should at least incorporate a means test designed to insure that only those who are in need of assistance would be compensated.

161. However, there is empirical evidence that suggests that any initial loss is soon made up. *See infra* note 167.

162. A further question is whether such a fund would be available to another potentially significant group—women who have cohabitated rather than married. In some instances, long-term cohabitations are the functional equivalent to marriage and include children. *See, e.g.,* Hewitt v. Hewitt, 77 Ill. 2d 49, 394 N.E.2d 1294 (1979) (three children); Morone v. Morone, 50 N.Y.2d 481, 407 N.E.2d 438, 429 N.Y.S.2d 592 (1980) (two children). The law has been increasingly willing to provide remedies for cohabitants at the end of their relationships. *See infra* note 193.

163. W. PROSSER & P. KEETON, *supra* note 72, at 536. This is not a new idea in tort law. *See, e.g.,* Feezer, *Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases*, 78 U. PA. L. REV. 805, 809-10 (1930).

164. *See supra* note 10 and cases cited therein.

165. W. Prosser, *The Assault upon the Citadel*, 69 YALE L.J. 1099, 1120 (1960); W. PROSSER & P. KEETON, *supra* note 72 at 537.

The possibility of social insurance to cover some divorce losses has already been discussed.<sup>166</sup> Although insurance can function as a loss-spreading device in a number of contexts, the conclusion here was that insurance would not operate effectively to reduce losses resulting from divorce. It could also be argued that a loss-spreading rationale does not support strict liability for divorce because the economically more powerful spouse does not have the ability to pass on the loss to others.

There are several possible responses to this argument. First of all, the word "loss" may not be appropriate to describe money paid as alimony in cases where one spouse's career has been enhanced by the sacrifices of the other. The spouse whose career has been enhanced continues, for a lifetime, to reap the financial and psychological benefits accrued. Overall, he has probably gained more than he has lost. Moreover, research by Lenore Weitzman suggests that for many husbands, any initial loss is soon made up.<sup>167</sup> Finally, societal patterns with respect to remarriage increase the possibilities that the husband will be able to mitigate some of his losses.<sup>168</sup> Since more divorced men than divorced women remarry, it is much more likely that a former husband will remarry than that his former wife will. Since today, most married women are in the workplace,<sup>169</sup> the husband's second marriage is likely to be one in which there are two incomes. This second income can help to offset the money paid to the former spouse as alimony. Thus, while an enhanced spouse may not be able to pass the loss on to an insurance company or to the public, he has other possibilities of lessening the impact of any losses he might suffer.<sup>170</sup>

## B. *Fairness and Reliance*

Fairness, whether in torts or family law, is a difficult concept to define. In torts, fairness can reflect a melding of many principles, including the relation-

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166. See *supra* text accompanying notes 154-61.

167. Weitzman's study concluded with the troubling, startling statistic that one year after divorce, the average former husband's standard of living had risen by 42%, while the former wife's declined by 73%. *THE DIVORCE REVOLUTION*, *supra* note 14, at 337-43. Weitzman attributed these different economic consequences to several factors: the inadequacy of court awards, expanded demands on the wife's resources after divorce, and the husband's greater earning capacity and ability to supplement his income. *Id.* See also McLindon, *supra* note 46, at 391-95 (also arguing that men emerge from divorce in a better economic situation than women, and by some measures in a better situation than pre-divorce). Weitzman's finding has been widely discussed. See, e.g., S. HEWLETT, *A LESSER LIFE: THE MYTH OF WOMEN'S LIBERATION IN AMERICA* 14 (1986); Kammeyer, *Book Review*, 48 J. MARRIAGE & FAM. 455 (1986); Scarf, *Cruel Contracts* (Book Review), 194 THE NEW REPUBLIC, Apr. 21, 1986 at 35, 37.

168. Of women who divorce, about three fourths eventually remarry, compared to about 5 out of 6 men. A. CHERLIN, *MARRIAGE, DIVORCE, REMARRIAGE* 29 (1981). These figures do not parse out the disadvantages women face as they grow older. Weitzman has given women in their 30's a 50% chance of remarriage, and those over 40 a 28% chance. *THE DIVORCE REVOLUTION*, *supra* note 14, at 204.

169. Recent Census data reveals that in 1988 more than half of all married women (56.7%) were employed. *CENSUS*, *supra* note 16, at 385.

170. Obviously, it will not always be true that the second spouse will be an economic asset rather than an economic liability. Since men typically earn more than women do, see *supra* note 21, it is obvious that most men marry women who earn less money than they do. These women may also bring to the marriage one or more children whose costs are not adequately met by child support payments from her prior spouse.

ship of the parties, the public interest, and the nature of the risk resulting in the loss.<sup>171</sup>

The concept of fairness is just as elusive in family law. What is considered fair is inevitably quite subjective. It is a function of the values attached to many variables such as the length of the marriage and the ages and earning capacities of the spouses. It can also reflect personal views concerning the division of roles within marriage, and beliefs as to what constitutes the appropriate motivations, choices, and expectations of marriage partners.

One argument grounded in fairness for imposing liability on the spouse whose career has been enhanced in one of the marriage patterns described in the Introduction to this Article is that the risks undertaken by the spouses are of such different magnitudes. It could be argued that the risks of marriage are always reciprocal. Both spouses take a risk that the marriage will fail, and clearly, both risk the emotional pain that generally accompanies divorce. However, it is clear that in the event of divorce, the economic loss often falls more heavily on one spouse than the other.

In many marriages, the wife invests in her husband. This investment may take many forms, including sending him to school, or providing him with domestic service and emotional support that enables him to devote his full energies to his career. In many cases, the wife also provides the lion's share of child care. In the event of a divorce, she has probably forfeited many career options and her chances to remarry have also been substantially reduced.

On the other hand, the spouse whose career has been enhanced has taken very little risk. After the divorce, the investment of both spouses in his career continues to inure to his separate benefit. Moreover, by virtue of his enhanced professional and/or economic standard, he is likely to be even more desirable as a marriage partner. Although it would seem difficult to address the problem of increased or decreased marriageability, it seems fair that at least the economic risks of marital failure should be more evenly distributed.

A related argument grounded in fairness is that the wife may have relied to her detriment on her husband's explicit or implicit representation that her sacrifices in the interest of the marriage would be rewarded. Although some may cling to an idealistic notion that in a marriage spouses are motivated totally by altruism, the reality is more likely that women who invest in the careers of their husbands expect to be rewarded at a later date. Thus, they believe that the time will come when the husband's career will be in full gear, the children will be older, and they will comfortably reap the fruits of their sacrifices. However, in the event of a divorce, these expectations go unfulfilled.<sup>172</sup>

Although the notion of protecting expectations would seem to be much more relevant to contract than to tort law, protection of expectations has also been described as a goal of tort law. In the products liability context, for example, courts have expressed the view that consumers should be able to reasonably

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171. TOWARD A JURISPRUDENCE OF INJURY, *supra* note 145, at 4-158.

172. One writer has suggested that the function of alimony is to provide the wife with a contingent claim payable in the event of divorce. See Landes, *supra* note 123. For further discussion of the nature of the investment the wife often makes in the earlier years of a marriage, see Ellman, *supra* note 13.

rely on the expectation that products they use will be safe. This reliance can be based either on specific representations of the manufacturer or on a broader notion of a general expectation of safety.<sup>173</sup> Moreover, in other contexts, the law has long recognized that certain relationships give rise to specific expectations that one party will take care not to injure the other. Thus, a standard higher than ordinary care is imposed on innkeepers and common carriers, and those having fiduciary duties.<sup>174</sup> An approach that reflects expectations of care, protection, and loyalty would clearly be appropriate in the marriage context.<sup>175</sup>

Another argument often advanced for strict liability in tort is that the defendant is engaged in profit-making activity and should therefore be required to pay for the harms such activity causes.<sup>176</sup> Liability may be imposed even where the court acknowledges that the defendant's activities themselves may provide some benefit to the public.<sup>177</sup>

It can also be argued that it is only fair that the spouse whose career has been enhanced during the course of the marriage should bear the costs that this benefit to him has imposed on the other spouse. Indeed, the argument for requiring the party making a profit to share the costs is even stronger in the domestic relations context. In a products liability case, the injured consumer may be only one of many thousands whose purchases have contributed to the defendant's profits. In a divorce, however, the relationship between the party who has benefitted and the party who has lost is much more direct. The sacrifices made in the name of the marriage have contributed in a very specific, personal way to the enhanced spouse's profit.

This rationale for strict liability in the divorce context is not based on an idea of wrongdoing, overreaching, or exploitation. These concepts are, and should be irrelevant in a true no-fault analysis. It is instead based on the simple idea that one who has benefitted economically from an arrangement that has resulted in loss to another should bear a part of that loss.

Two final but important issues bear on the question of fairness—the role of choice and the effect of marketplace disparities.

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173. TOWARDS A JURISPRUDENCE OF INJURY, *supra* note 145, at 4-184 to 4-187. In *Escola v. Coca Cola*, it was noted that the consumers' "erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trademarks . . . consumers no longer approach products warily but accept them on faith, relying on the reputation of the manufacturer or the trademark." *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 467, 150 P.2d 436, 443 (1944) (Traynor, J., concurring). *See also*, *Fulbright v. Klamath Gas. Co.*, 271 Or. 449, 460, 533 P.2d 316, 321 (1975) (satisfaction of reasonable expectations of the purchaser or user).

174. TOWARD A JURISPRUDENCE OF INJURY, *supra* note 145, at 4-186 to 4-187; FRANKLIN & RABIN, *supra* note 30, at 40-41.

175. This has been recognized in some decisions. *See, e.g.*, *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755, 758 (Minn. 1981) (in exercising equitable authority, the court keeps in mind that one spouse has made an economic sacrifice with the "reasonable expectation" of enjoying a higher standard of living); *Mahoney v. Mahoney*, 91 N.J. 488, 502-03, 453 A.2d 527, 535 (1982) (shared expectations of increased income and material benefits justify reimbursement alimony).

176. W. PROSSER & P. KEETON, *supra* note 72, at 537.

177. *State v. Ventron* 94 N.J. 473, 468 A.2d 150 (1983) (strict liability for pollution caused by mercury processing plant); *Langan v. Valicopters, Inc.*, 88 Wash. 2d 855, 567 P.2d 218 (1977) (strict liability imposed for crop dusting pesticides settled on plaintiff's organic farm).



One potential objection to strict liability for divorce losses is that it ignores the role of choice. Thus, it could be argued that many women make an affirmative choice to stay home or to emphasize family over career—they are not forced to do so by their husbands. Such women often live quite comfortable lifestyles, enjoying a standard of living they would have been unable to provide for themselves. Under this analysis, if the wife suffers a loss upon divorce, it is a result of her own lifestyle choice, and it was not caused by her husband.

Causation is a requirement for liability in tort, even under strict liability.<sup>178</sup> Still, causation should not be a relevant issue in a divorce. It should not matter what the decision making process was that led to the division of labor in a particular marriage. No matter which spouse actively advocated the marital structure ultimately adopted, the decision should be considered to be a joint one. In light of this, it seems unfair to saddle the wife with a disproportionate amount of the losses that may result from that decision. Secondly, assuming that there is a causation issue, it can be answered easily by asking: Would the wife have invested in the marriage and foregone opportunities for self-development in the absence of an expectation of later reaping the benefits of such a sacrifice?<sup>179</sup> Finally, the notion of choice in this context is a complex one. To state that women who compromise their careers in favor of family life choose to do so simplifies what is a much more complex issue. Although individual preferences do play a part, women's choices with respect to marriage and family life are also a function of the messages women receive from society concerning appropriate gender roles. These messages may also be reinforced by specific class and cultural expectations.<sup>180</sup>

A final issue that bears on fairness is the problem of marketplace disparities. The fact that women often make sacrifices in favor of their marriages is not the only reason that they may be left in a disadvantageous position at the time of divorce. The losses women suffer as a result of these sacrifices are compounded by the fact that in the marketplace, most women make less money than most men.<sup>181</sup> This fact raises the hard issue as to whether it is fair that an individual husband should have to pay for the discrimination that the world visits upon women as a group.

In most of the marriage patterns described in this Article, the wife had made sacrifices or compromises that clearly caused her to forego opportunities

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178. See *supra* note 138 and accompanying text.

179. See Ellman, *supra* note 13 at 40-53.

180. See Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986), where the author argues that women often form "adaptive preferences" in which their choices with respect to spousal relations reflect their experiences in a system that restricts their opportunities, *id.* at 1145-46.

This is not to deny that there are some women who would choose to stay home with their children rather than work outside of the home even in a society where there was complete equality between the sexes. There are probably many individuals, male and female, who would derive greater personal satisfaction from the domestic role than from working outside of the home. Still, the decision that one spouse will play the domestic role is one that both parties must agree to if the marriage is to continue. The fact that the spouse who stayed at home in fact preferred that role should be irrelevant.

One of the advantages of strict liability in tort law is that it is not based on a paradigm of reasonableness. For similar reasons the doctrines of contributory negligence and assumption of risk should not apply to the divorce context. The role of these doctrines in strict liability in tort is in a state of evolution. See *supra* note 138.

181. See *supra* note 21.

in the workplace and that clearly benefitted the husband. Thus, although marketplace disparities would compound her loss, a major part of her loss could be identified as the lost opportunities and reduced earning capacity she suffered because of her absence from or diminished participation in the workplace for several years.

Let us hypothesize a fact pattern that permits a more stark isolation of the market disparity issue. Assume that a male doctor marries a female secretary. The marriage lasts twenty years, during which time both spouses remain employed. They have no children. Then there is a divorce. The wife will clearly suffer a long term loss in her standard of living; she will no longer enjoy the standard of living of a doctor's wife.

It could be argued that this scenario does not fit the sacrifice/benefit paradigm because: 1) to a great degree, the husband had already attained his professional status at the time of the marriage; 2) the wife's career choices had already been made at the time of the marriage; and 3) during the marriage, the wife lived at a much higher standard of living than she would have been able to provide for herself.

Does the strict liability argument advanced in this Article provide a rationale for alimony for such a spouse? Causation is a problem here too, because her losses are not a function of a marriage structure in which she has foregone opportunities she otherwise might have pursued. Instead, her continuing economic losses are a function of the societal realities that doctors earn more than secretaries, and men tend to be doctors while women tend to be secretaries.

It could be argued that because men benefit from discrimination it is not unfair that they should have to pay for it. Another argument could draw from the tort analogy of the thin skull rule, which holds a defendant liable for all of the plaintiff's injuries even those caused by the plaintiff's unusual vulnerabilities.<sup>182</sup> Under this analysis, if women's position in the society makes them more vulnerable economically at divorce, the amount the husband must pay should accommodate this reality. However, it is not necessary to reach either of these controversial arguments, because a rationale for alimony, in appropriate cases, can be based on other factors. First, even though both parties were employed, the wife still probably performed a larger share of the domestic responsibilities than the husband.<sup>183</sup> Thus, some compensation could be based on her contribution to the marriage under other rationales for alimony such as partnership or sharing principles,<sup>184</sup> and the strict liability doctrine need not even be invoked. Secondly, a reliance argument would be appropriate in those cases in which the marriage has been a long one. There, it could be argued that the length of the marriage created an expectation of a continued lifestyle at a certain level. Obviously such a reliance interest would be much weaker in a short marriage. In cases where the wife has made no appreciable sacrifice, or the marriage has been a short one, alimony may not be warranted at all.

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182. W. PROSSER & P. KEETON, *supra* note 72, at 292; *Stoleson v. United States*, 708 F.2d 1217 (7th Cir. 1983).

183. See A. HOCHSCHILD & A. MACHUNG, *supra* note 143; R. Hertz, *supra* note 143.

184. See *supra* text accompanying notes 117-22 and 126-28.

### C. *Reducing the Burden on the Public Fisc*

Economic losses caused by personal injury and economic losses caused by divorce both can have implications that go far beyond the individuals involved. Imposing strict liability in tort on certain classes of activities promotes the likelihood that the defendant rather than the public will pay for the losses suffered by the injured party.

The law governing divorce also reflects concern for the public interest. There are a number of legal rules designed to decrease the possibility that a former spouse will wind up destitute. For example, many courts will void an antenuptial contract that would leave one party to the contract a public charge.<sup>185</sup> Also, primary reasons for the duty of support<sup>186</sup> and the doctrine of necessities<sup>187</sup> are that the public should not have to bear the economic costs of an ongoing marriage that can be borne by the other spouse. An approach that conceptualizes alimony as a legitimate form of compensation for losses incurred as a result of compromises in the interest of the marital unit increases the chances that alimony will be awarded. This decreases the chances that the economically disadvantaged spouse will ever have to turn to public funds for support.

### D. *Deterrence*

Deterrence would seem to be a more important consideration in torts<sup>188</sup> than in family law. However, the question of the effect of legal rules on behavior is an important one in both areas. One function of tort law is that of setting standards of conduct: imposing liability for certain types of behavior signals those who would engage in those behaviors that they will be held accountable for the losses they cause. The hope is that the rule of law will assist in shaping human behavior in ways considered socially desirable.<sup>189</sup>

In family law, courts frequently discuss the effect of a legal rule on the institutions of marriage and the family.<sup>190</sup> This raises the question as to the possible effects of a rule that would basically require payment of alimony in marriages that fit the sacrifice/benefit paradigm.

There are several relevant issues: First, the effect on the decision to marry; second, the effect on the decision to divorce; third, the effect on the allocation of

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185. See, e.g., *Connolly v. Connolly*, 270 N.W.2d 44 (S.D. 1978); *Duncan v. Duncan*, 652 S.W.2d 913 (Tenn. Ct. App. 1983). The Uniform Marriage and Divorce Act and the Uniform Premarital Agreements Act both permit courts to override agreements in which the provisions governing spousal support would have the effect of leaving one spouse a public charge. See U.M.D.A. § 10(i); U.P.A.A. § 6(b).

186. See CLARK, *supra* note 5, at § 6.1.

187. See CLARK, *supra* note 5, at § 6.3.

188. W. PROSSER & P. KEETON, *supra* note 72, at 25-26; CALABRESI, *supra* note 74 (passim).

189. W. PROSSER & P. KEETON, *supra* note 72, at 25-26. Even in tort law, the relationship between legal rules and behavior is still a controversial issue, regardless of whether the rule in question is negligence or strict liability. See, e.g., Posner, *supra* note 136, at 32-33.

190. For example, some courts have rejected remedies between cohabitants on the ground that providing such remedies undermines marriage or, in effect, revives common law marriage, which most states have abolished. See, e.g., *Hewitt v. Hewitt*, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979).

roles during the marriage; fourth, the effect on the bargaining process at the time of divorce.

Since the law continues to place a high value on marriage,<sup>191</sup> the first issue is whether such a rule would deter people from getting married. It is unlikely to have much of a deterrent effect. First, people marry for a host of reasons other than economic ones. These reasons may include personal preferences, religious beliefs and a desire to conform to the expectations of families, friends and communities. Second, even under the old fault rules, people did not necessarily assume that they could walk away from their marriages without incurring costs. This did not discourage people from getting married. Finally, people who cohabit rather than marry can still incur significant liabilities in states that recognize contract and equitable remedies between cohabitants. The high profile of certain cases such as *Marvin v. Marvin*<sup>192</sup> has probably resulted in some vague public awareness that cohabitation too, can have legal consequences.<sup>193</sup>

The second issue is the possible effect on rates of divorce. It is clear that no-fault divorce makes divorce easier. Certainly the present system in which the enhanced spouse is able to walk away with most of the career assets gives that spouse incentive to end an unhappy marriage. A strict liability approach that would require compensation in most cases would probably deter some people from getting a divorce. But here, too, the rule would likely have a limited effect. People decide to leave marriages all the time, even when they are aware that the economic costs may be substantial.

A strict liability approach might have two other possible effects. One is discouraging couples from structuring their marriages so that one party is engaging in most of the self-sacrificing behavior. If the enhanced spouse knows that he will be required to share his post-divorce income with his former spouse, he may be less interested in a marital structure that is so one-sided with respect to benefits and sacrifices. This may mean, as a practical matter, that both parties go to law school, or that they share household tasks and child rearing responsibilities more equally, even though this may mean less career advancement for both. But even here, it is doubtful that a strict liability rule would have a major effect. The structuring of marital roles is a function of many non-legal factors, including personal preferences and cultural and class norms. Moreover, until they find themselves in the unfortunate context of divorce, most people are woefully uninformed about what they would be entitled to in the event that their marriage ended.

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191. Even as it extended the broadest remedies to cohabitants in *Marvin v. Marvin*, the California Supreme Court felt compelled to extoll the virtues of marriage ("the structure of society itself depends upon the institution of marriage, and nothing we have said in this opinion should be taken to derogate from that institution"). 18 Cal. 3d 660, 684, 557 P.2d 106, 122, 134 Cal. Rptr. 815, 832 (1976).

192. 18 Cal. 3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 (1976).

193. In *Marvin*, the California Supreme Court held that contracts between cohabitants respecting earnings and property are enforceable, and that relief could also be granted on the basis of theories of implied contract and equitable remedies. Some jurisdictions have permitted recovery based on some or all of the theories expressed in *Marvin*. See, e.g., *Morone v. Morone*, 50 N.Y.2d 481, 407 N.E.2d 438, 429 N.Y.S.2d 592 (1980) (express contract only); *Watts v. Watts*, 137 Wis. 2d 506, 405 N.W.2d 303 (1987) (express, implied and equitable remedies).

The most significant effect the rule might have is that of deterring unfair bargaining in the dissolution process. If the advantaged spouse knows that the other spouse has a well established right to substantial compensation, he may be more willing to bargain fairly than he would under a system that does not recognize such a right. Obviously this does not determine how much compensation the spouse, who has forgone opportunities, would be entitled to receive. However, it would go a long way in establishing the idea that she is entitled to something that will substantially reduce post-divorce economic disparities between the parties. What seems especially promising about this approach is that it may give back to women some of the leverage they lost under no-fault.<sup>194</sup>

#### E. *System Costs and Administrative Costs*

In addition to reducing the losses of the spouse who has made sacrifices, a strict liability theory could have a positive effect on other costs of divorce. The possibility of the public bearing the secondary costs of divorce is decreased if the economic losses from the marriage are internalized between the spouses rather than externalized to the public. Also, administrative costs to the public would be decreased if litigation is not required to establish a right to alimony,<sup>195</sup> or to convince the court that the award should be permanent. If both parties know that the court is likely to award some alimony, they may be encouraged to settle rather than litigate. Thus the rule could have the effect of furthering another important goal of tort law—encouraging settlements.<sup>196</sup> Litigation costs might still be incurred in those cases where couples dispute issues such as the degree of sacrifice made during the marriage or the degree of economic disadvantage suffered. However, even if litigation costs are not significantly reduced, the reduction in losses to disadvantaged spouses and the potential savings to the public fisc still make the strict liability approach worthwhile.

#### F. *Consistency and Predictability*

One criticism of the fault system in torts is that it permits widely divergent treatment of people who have suffered similar losses. Advocates of no-fault automobile insurance, for example, argued that under the fault system, many accident victims went unpaid or were paid only a fraction of their losses, while many who suffered trivial injuries were overpaid.<sup>197</sup> In family law, although a number of statutes set forth general criteria for the award of alimony,<sup>198</sup> these statutes give no indication as to how much weight any particular factor should

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194. See *supra* text accompanying notes 46-57.

195. A number of scholars have concluded that when the outcome of a case is uncertain, the parties will differ in their predictions of the outcome and, therefore, will be more likely to litigate the dispute. See Mnookin & Kornhauser, *supra* note 53; see also Priest & Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 13-20 (1984).

196. TOWARD A JURISPRUDENCE OF INJURY, *supra* note 145, at 4-209.

197. R. KEETON, J. O'CONNELL & J. McCORD, *supra* note 90 (Forward); BASIC PROTECTION, *supra* note 25, at 2.

198. See, e.g., CONN. GEN. STAT. ANN. § 46b-82 (West 1986); OR. REV. STAT. § 107.105(d) (1983); WIS. STAT. ANN. § 767.26 (1981).

be given or as to whether any particular substantive outcome is desired. As a result, awards of alimony remain largely subject to judicial discretion. A number of scholars have argued that divorce doctrines that rely on judicial discretion operate to women's disadvantage.<sup>199</sup> This is not surprising. Although a substantial number of women still play the traditional roles in which the husband is either the sole provider or is the spouse whose career needs take priority, statistically only a small number of women are awarded alimony.<sup>200</sup> A principle that mandates the award of alimony as compensation for losses incurred as a result of these marital roles would reduce judicial discretion and hopefully result in more awards of this important form of divorce compensation.

None of the foregoing discussion tells us how much alimony should be awarded in a particular case. In tort law, there is a general maxim that the purpose of damages is to compensate the plaintiff fully.<sup>201</sup> However, there is also a recognition that in a very real sense, full compensation is not possible.<sup>202</sup> Nor can full recovery be expected in the divorce setting. In many cases, the loss of economies of scale makes full compensation for economic losses impossible. Emotional losses are an even more complex issue.

There have been a number of proposals addressed to the issues of the amount and duration of alimony. It has been suggested that the parties be required to continue to share income for a set number of years after marriage based on the length of the marriage.<sup>203</sup> It has also been suggested that where alimony is to be of limited duration, the standard for termination should be one of self-sufficiency adequate to compensate the economically disadvantaged spouse for benefits conferred and earning capacity lost during the marriage.<sup>204</sup> The reality, however, is probably that the economically weaker spouse can never be put back in as good a position as she was in prior to the termination of the marriage.

What constitutes appropriate compensation at the end of a marriage is a complex issue with which family law scholars will continue to struggle. However, whatever approach is eventually adopted should focus on the idea of equal sharing of the risk of loss to ensure that there is equal sharing of both the benefits and the burdens of the failed marriage.<sup>205</sup>

In tort law, the amount of compensation awarded the plaintiff is also affected by the doctrine of mitigation of damages.<sup>206</sup> This doctrine requires the

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199. See *THE DIVORCE REVOLUTION*, *supra* note 14, at 384 (equitable v. equal distribution); McLindon, *supra* note 46, at 404 (child support and alimony). See also Singer & Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 519-20 (1988) (custody).

200. See *supra* note 14.

201. See *supra* text accompanying note 145.

202. See Franklin, *supra* note 73, at 791. For example, a person's inability to engage in activities or hobbies he formerly enjoyed cannot be restored and it could be argued that no amount of money can really compensate for this loss.

203. Singer, *supra* note 22, at 1117-18.

204. See, e.g., Krauskopf, *Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony*, 21 FAM. L.Q. 573, 588 (1988). For another approach, see, Ellman, *supra* note 13, at 53-71.

205. A number of writers have advocated some form of "result equality" at the end of a marriage. See, e.g., Fineman, *supra* note 47, at 826-42; *THE DIVORCE REVOLUTION*, *supra* note 14, at 357-401.

206. This is also sometimes referred to as the doctrine of avoidable consequences. See W. PROSSER & P. KEETON, *supra* note 72, at 458-59.

plaintiff to take reasonable steps to lessen the impact of her injury. To the extent that the plaintiff fails to do this, the defendant is not liable for those damages that could have been prevented. In the marriage context, there remains the difficult question of balancing compensation with the view that, in appropriate cases, the former spouse should have some incentive to lessen her own losses.<sup>207</sup>

This raises a difficult issue. The question as to how extensive compensation should be has implications beyond the effect on particular individuals—there is a political dimension as well. Rules that protect the economic interests of women who play traditional roles in marriages also have a downside. They may encourage women to play dependent roles.<sup>208</sup> If women know that sacrifices in favor of their marriages will be rewarded in the event of divorce, they may be more willing to play traditional roles rather than put effort into becoming economically self-sufficient.

There are negative consequences to economic dependence on a marriage, even if the marriage does not end in divorce. In a worst case scenario, economic dependence can result in an increased willingness to tolerate emotionally or even physically abusive behavior. Moreover, the dependent role has risks even in a happy, successful marriage. The husband might die, or suddenly become disabled or unemployed. It could be argued that women need to be placed on notice of the need to become more independent so that they need not depend on the legal system to protect their economic interests in the event of divorce or on the social welfare system to protect them in the event of other disasters. Rules that provide for less than “full” compensation in the event of divorce may have the effect of encouraging independence.<sup>209</sup>

One problem in supporting an approach that provides less than full compensation on the theory that it will encourage economic independence is that this seems unfair to those women for whom it must constantly seem that the rules are changing in the middle of the game.<sup>210</sup> Many older women who today find themselves in the midst of divorce entered into marriage at an earlier time, in which there were different expectations, values, and far fewer options outside of marriage.<sup>211</sup> Rules that may serve a positive function for younger women may simply punish older ones.

A kind of “grandmother clause” may be one way to address the problem. Under such an approach, new rules would apply only to marriages entered into after a certain date or only to marriages of a certain duration. However, the problem would still remain that most people, men or women, young or old, are quite unaware of what the law is. Secondly, for many women, playing economically dependent or self-sacrificing roles in marriage is very much a function of

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207. The notion of rehabilitative alimony is similar to mitigation of damages in that both doctrines require the party suffering losses to take reasonable steps to reduce her losses. *See supra* text accompanying notes 112-13.

208. *See Kay, supra* note 43, at 80.

209. Professor Herma Hill Kay has argued that changing no-fault divorce rules so as not to disadvantage women who have played the traditional roles can have the inadvertent effect of perpetuating female dependence by supporting the choice of such roles. *See, Kay, supra* note 43, at 85, 90.

210. *See generally, THE DIVORCE REVOLUTION, supra* note 14.

211. *Id.*

values related to class and ethnicity. It would seem patently unfair to penalize people for choices that are a function of such factors.

Moreover, there remains the question as to whether the choices women make concerning their roles in marriage would be affected by any legal rule. Behavior is shaped by many extra-legal considerations, including personal choice, age, class, culture, and the perception of one's options. It may be that there is no rule that would have a material effect on women's decision-making concerning choices between family life and work.

The dilemma of encouraging women to be independent while protecting those who have played more traditional roles in marriage must continue to be addressed. Of course, the encouragement of economic independence must also be accompanied by a struggle to make the marketplace one in which there is opportunity to achieve. At the same time, efforts must continue to ensure compensation for those women who suffer economic losses as a result of playing traditional roles.

## V. CONCLUSION

No-fault divorce and tort law approaches, eliminating consideration of fault, gained acceptance during the same period, but these parallel developments had very different consequences.

Clearly, the parameters of liability without fault in tort law are still unclear. However, in those areas where it has been applied, the focus has been on rationales and mechanisms to promote compensation of the party suffering losses. In family law, however, criticism of the effect of no-fault divorce has only recently forced us to think about what the relationship should be between no-fault and the economic consequences of the "accident" of divorce.

No-fault divorce should have the same focus as liability without fault in torts—promoting compensation for losses. Many of the same rationales that support strict liability in tort support adequate compensation at the end of a marriage for the losses incurred by the many spouses who sacrifice or compromise their individual interests in furtherance of their marriage. Unless no-fault divorce is reconceptualized so as to ensure compensation to such spouses, what was hailed to be a significant step forward in family law may prove to be, at best, little more than a cosmetic change.